Université de Genève
Institut Universitaire de Hautes Etudes Internationales

# DELIMITATION OF INTERNATIONAL BOUNDARIES

A Study of Modern Practice and Devices
From the Viewpoint of International Law

THÈSE

présentée à l'Université de Genève
pour l'obtention du grade de Docteur ès sciences politiques

par
Itamar BERNSTEIN
Israël

THESE No. 239

Imprimerie des presses de l'université
Tel Aviv
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La Commission mixte, composée des doyens des Facultés de droit, des lettres, et des sciences économiques et sociales, et du directeur de l'Institut universitaire de hautes études internationales, sur le préavis de Madame Denise BINDSCHEDLER, professeur à l'Institut, de M. Philippe CAHIER, professeur à l'Institut, et de M. Shabtaï ROSENNE, membre associé de l'Institut de droit international, et ancien membre de la Commission de droit international, autorise l'impression de la présente thèse, sans entendre par là exprimer d'opinion sur les propositions qui y sont énoncées.

Genève, le 20 juillet 1972.

Pour la Commission mixte:

Jacques FREYMOND

Directeur de l'Institut universitaire

UNIV. LEIDEN BIBL.

Thèse No. 239

"And unto Eber were born
two sons: the name of one
was Peleg; for in his days
was the earth divided; . . . "
Genesis, Chapter 10, 25.

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To the Memory of
My Father

## PREFACE

The acuteness of the present subject was described by the eminent American specialist, A.W. Boggs, in the following terms:

> "The location of the boundary may . . . determine for millions of people the language and the ideas which children shall be taught at school, the books and newspapers which people will be able to buy and read, the kind of money they shall use, the markets in which they must buy and sell, and perhaps even the kinds of food they may be permitted to eat; it determines the national culture with which they shall be identified, the army in which they may be compelled to serve a term, the soil which they may be called upon to defend with their lives whether or not they choose to defend it" (I).

The present disquisition – which has the specific goal of responding the question: how is the location of boundaries decided and operated? – could not have been accomplished without the invaluable advice and encouragement of Professor Phillipe Cahier, of the Graduate Institute of International Studies, who supervised its preparation. I am especially thankful to him for his sober, pragmatical observations and suggestions.

Professors Denise Bindschedler, Paul Guggenheim and Lucius Caflisch, all of the mentioned Institute, greatly emboldened me in the course of my study therein, for which I wish heartily to thank them.

Mr. Shabtai Rosenne, Associate Member of the Institute of International Law, and Former Member of the International Law Commission, read part of the manuscript in draft form and made stimulating criticism and suggestions. These were thoroughly considered and served greatly to improve the thesis. I am very grateful to him, especially because I know he had little time to spare, although he generously gave freely of it at my request.

It goes without mentioning that the responsibility for errors, omissions and inaccuracies, as well as for propositions expressed herein, rests entirely with the author.

Geneva, Summer 1972 Itamar Bernstein

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# INTRODUCTION

The literature on boundaries is quite abundant. Most writers, however, concern themselves with the political, geographic or sociological aspects of the subject. Very little has been written on its purely legal aspect in the form of general studies, because political problems virtually dominate every discussion of boundary questions, such problems being of the first order of importance in every question relative to boundaries. This is why notions like "natural", "artificial", "strategic" boundaries, etc., which are extra-legal in substance, are so widely dealt with, even in legal works.

The importance of boundary problems and the frequency of disputes arising on this background incited many writers to examine problems of specific boundaries, often in relation to legal issues. Documentary material is vast. In the present study we endeavoured to extract from the various cases some basic legal problems relative to delimitation, to concentrate and concretize them in a cohesive logical construction so as better to understand the subject as a whole from the viewpoint of international law. It is thus proposed to demonstrate the logic of the continuity in resemblance of the problems involved and draw the necessary conclusions.

In the following pages we try to elucidate the subject and its components and summarily to set out the plan of the work.

## A. *THE SUBJECT: CLASSIFICATION AND TERMINOLOGY*

### I. *"Delimitation"*

Boundary-making is a complicated process, of which "delimitation" is but one stage[1] denoting the decision-making phase as distinguished from the phases of preparation on the one hand and execution on the other[2].

Expressed in terminology, the difference between the two main processes in boundary-making, that of its determination and definition

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[1]See JONES, Stephen B. *Boundary-Making. A handbook for Statesmen, Treaty Editors and Boundary Commissions.* Washington, Rumford Press, Concord, N.H., 1945; p. 5.

[2]See LAPRADELLE, Paul de. *La Frontière, étude de droit international.* Paris, Editions internationales, 1928; pp. 72/3.

and that of its description and physical fixation was established by Sir Henry MacMahon by the use of two terms: "delimitation" and "demarcation". In his words:

> "Delimitation I have taken to comprise the determination of a boundary line by Treaty or otherwise, and its definition in written, verbal terms; "demarcation" to comprise the actual laying down of a boundary line on the ground, and its definition by boundary pillars or other similar physical means"[3].

These terms are used herein in the same sense, the term "demarcation", when resorted to, relating to the process of physically materializing the documentary definition of the boundary on the earth's surface, "delimitation" referring to all the proceedings connected with the determination of a boundary line[4]

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Subject to some qualifications, international law imposes no substantial imperative rules for delimitation of land boundaries[5], the choice of the methods or principles of delimitation is, therefore, purely optional, and in this sense delimitation is a totally subjective operation. This does not mean, however, that:

> "La seule condition juridique de la délimitation est la réalisation d'un accord entre les parties intéressées sur l'adoption d'un procédé de délimitation. Peu importe son mode de réalisation, qu'il soit immediat ou non, qu'il s'agisse d'une ligne directement décrite, ou suspendue à un procédé de décision immediatement adopté, tel le plébiscite"[6].

A boundary is a geometrical, lineary construction and can not be otherwise defined. Before it is thus defined it can not be held juridically existing[7]. However, due to the subjective character of the delimitation

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[3]MacMAHON, Sir Henry A. "International Boundaries". *Journal of the Royal Society of Arts*, vol. 84 (Nov. 15, 1935); p. 4.

[4]CUKWURAH, A.O. *The Settlement of Boundary Disputes in International Law.* Manchester, Manchester University Press, 1957, pp. 27-29; JONES, pp. 57-71.

[5]See LAPRADELLE, p. 88.

[6]*Ibid.*, p.106.

[7]For example, contracting states may leave the task of defining the boundary to demarcation (or "delimitation") commissions; since the choice oftthe method of delimitation is optional, such commissions may be endowed with very wide discretionary powers (see JONES, pp. 57-63; LAPR. DELLE, p. 147). In such cases the constitutive phase of the operation is not consummated efore the boundary is defined in some geographical terms by this body.

operation the juridically operative phase is usually terminated once a procedure for determination has effectively been established. Accordingly, this study does not relate to the work of so-called "delimitation commissions" or similar bodies, which does not involve major legal problems in the present context.

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As a juridical operation delimitation essentially involves problems concerning the authority competent to fix a boundary and the extent of its powers. The question of considerations for particular location of boundaries is extra-legal, mainly political in character; such considerations being invoked opportunistically, according to prevailing circumstances and not in application of rules of law. Therefore, we refrained from treating such questions in this study. Likewise, no thorough discussion of legal problems relating to the executionary phase of the boundary-making process (such as interpretation of delimitation treaties) which are not questions of delimitation *in proprio sensu* was made herein.

## 2. *"Boundary" and "Frontier"*

As a geometrical construction, a "boundary" is a line (*limes, limite, grenzlinie* or *Grenz*) separating states. A "frontier" (*finis, frontière, Grenzland*) is a zone of communication bound to a special legal, political and economical regime in municipal and international law[8]; a region having width as well as length[9]. The conception of "frontier" was the dominant one in the ancient and medieval world, where the function of separation was fulfilled mainly by "marshes" and similar areas[10] while its lineary correlative, the "boundary", is a more modern conception[11]. It is comprehensive that in a modern world, carefully divided between zealously "sovereign" states, the vague and indefinite construction of the "frontier" should gradually disappear[12]. It is noteworthy, however, that this phenomenon contemporarily exists, mainly in remote and desert-like regions of

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[8]See LAPRADELLE, *La Frontière*, p. 14.

[9]BOGGS, *International Boundaries*, p. 22; VERZIJL, D.H.W. *International Law in Historical Perspective*. Leyden, Sijthoff, 1970, vol. III, pp. 513-515.

[10]See REEVES, J.S. "International Boundaries". *A.J.I.L.*, vol. 38 (1944), pp. 533-545.

[11]LAPRADELLE, *La Frontière*, pp. 18-51.

[12]See CUKWURAH, pp. 11-12.

the world[13]. In this work the terms "boundary" and "frontier" have been used in their above denotation, except in citations (for these terms are largely used interchangeably in doctrine and state practice).

### 3. *"International Boundaries"*

As Boggs explains, "International Boundaries" comprise all boundaries between two (or more) states, whether they traverse land, rivers, lakes, or arms of the sea through territorial waters to the High Sea[14]. This applies today also with regard to continental shelf areas.

In this connection a distinction should be drawn between national and international boundaries; the former notion denotes the limit of state territory, concerning one state and being primarily an institution of its municipal law, the second is a concept of international law, concerning two or more contiguous states in their mutual relations. Thus, for example, "international boundaries" do not usually include seacoasts: for the seaward boundaries of the territorial waters (or of the continental shelf) of a state, such as circumscribe the high seas are national, not international, boundaries[15]. As Lapradelle put it:

> "Sur mer comme sur terre, la limite internationale ne s'impose que pour départager des compétences égales et contigües"[16].

The international boundary limits competences emanating from international law. It is distinct, consequently, from administrative boundaries, such as may exist within a state, which are an institution of municipal law and no capital subject for discussion herein. A boundary separating states having common institutions, however, is an international boundary. In the Jaworzina boundary dispute between Czechoslovakia and Poland[17] the P.C.I.J. stated, on the problem of the nature of the pre-First World War boundary between Hungary and Galicia, that:

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[13] See, for example, the Rann of Kutch award in *International Legal Materials*, vol. vii, no.3, May 1968, pp. 633-708 (extracts from *The Indo-Pakistan Western Boundary Case Tribunal*. Award, 19 February (introduction, conclusions and three maps), printed by the manager, Government of India Press, Faridabad, 1968); the agreement between Kuwait and Saudi Arabia relating to the neutral zone of July 7, 1965. *A.J.I.L.*, vol. 60 (1961), p. 744 (and see AZZAM, I. "The Saudi-Arabia - Kuwait Neutral Zone" *N.T.I.R.*, vol. 13 (1966), pp. 34-36; HASNI, S.M. "The Partition of the Neutral Zone". *A.J.I.L.*, vol. 60 (1966), pp. 735-749).

[14] BOGGS, *International Boundaries*, p. 22.

[15] *Loc. cit.*

[16] LAPRADELLE, *La Frontière*, p. 212.

[17] *P.C.I.J., Series B*, no. 8.

"There we have not merely an administrative boundary but an international frontier which separated two states. In the opinion of the Court, which differs from that adopted by the Delimitation Commission on September 25th, 1922, the frontier between Hungary and Galicia was in August 1914 an international frontier, Galicia being then part of the Austrian Monarchy. . . Although Austria and Hungary had common institutions based on analogous laws passed by their legislatures, they were nonetheless distinct international units"[18].

## B. *THE LEGAL NATURE OF THE SUBJECT*

### 1. *The Function of Delimitation*

As an institution producing reciprocal effects the function of the international boundary, in contradistinction from that of the national boundary, is not "the restriction of the legal existence of the state"[19] but, primarily, separation between contiguous "territorial spheres of validity of. . . various national legal orders"[20]. Indeed, the operation of delimitation, separation of contiguous state territories, is to be distinguished from operations affecting allotment of territory. Practically, every delimitation of boundaries involves partition of territory. Juridically, however, these operations are considered distinct, as the I.C.J. stated in the continental shelf cases[21] "the appurtenance of a given area, considered as an entity, in no way governs the precise delimitation of its boundaries, any more than uncertainty as to boundaries can affect territorial rights". In this study we tried to avoid considering questions of territorial status and to distinguish such questions from genuine boundary problems as far as this was feasible.

### 2. *Delimitation is an Optional Operation*

Separation is the special and capital characteristic of the international boundary. It is, nevertheless, *par excellence* the type of question interesting adjacent states, not the international community. This explains why the establishment of international boundaries is facultative, not mandatory

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[18] *Ibid.*, pp. 42-3.

[19] KELSEN, Hans. *Principles of International Law.* 2nd ed. New York, Holt, Rinehart and Winston Inc., 1966; p. 308.

[20] *Loc. cit.*

[21] *I.C.J. Reports,* 1969, p. 1, at p. 32.

upon limitrophe states; as the I.C.J. pointed out in the continental shelf cases:

> "There is . . . no rule that the land frontiers of a state must be fully delimited and defined, and often and in various places and for long periods they are not".[22]

Thus, the existence of international boundaries is not a condition *sine qua non* to the existence of a state in international law, as the German-Polish mixed Arbitral Tribunal stated as early as 1921 in the case of *Deutsche Continental Gas Geselschaft v. Poland*[23]:

> "Pour qu'un état existe et puisse être reconnu tel avec un territoire sans lequel il ne pourrait ni exister ni être reconnu, il suffit que ce territoire ait une consistence suffisament certaine (alors même que les frontières n'en seraient pas encore exactement délimitées) et que sur ce territoire, il existe en réalité la puissance publique de façon indépendente".[24]

Likewise, it was stated by the representative of the United States (Jessup) in the Security Council, during the discussion of the question of admission of Israel to the United Nations, that:

> "One does not find in the general classic treatment of this subject any insistence that the territory of a state must be exactly fixed by definitive frontiers. We all know that, historically, many states have begun their existence with their frontiers unsettled . . . the formulae in the classic treaties somewhat vary, one from the other, but both reason and history

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[22] *Loc. cit.*; but see opinion of LAPRADELLE (*La Frontière*, pp. 65-72) who proceeds from consideration of political utility (*ibid.*, pp. 59-65) to argue that:

> "L'utilité de la limite pour la construction de l'état moderne peut être considerée . . . comme le fondement d'un droit de delimitation . . . D'autre part, l'entreprise de la délimitation des frontières des Etats, apparue tardivement à la fin du XVIII siècle, s'est répandue dans le monde durant toute la XIXe. A l'heure actuelle, la délimitation est une coutume établie, dont le caractère de généralité et de permanence fonde le droit, la coutume généralement admise et observée étant une des sources essentiels du droit." (*ibid.*, pp. 65-6);

and see KELSEN, *Op. Cit.*, p. 308.

[23] *Recueil des décisions des tribunaux arbitraux mixtes-institués par les traités de paix*, 1921-1933; vol. 9, p. 346.

[24] And see *P.C.I.J., Series B.*, no. 12, pp. 20-1.

demonstrate that the concept of territory does not necessarily include precise delimitation of the boundaries of that territory".[25]

Indeed, as is demonstrated below[26] recognition of a state does not imply recognition of its boundaries, the latter institution not being regarded as an indispensable element of statehood[27].

### 3. *Stability and Finality as Inherent Characteristics to the Notion of International Boundaries*

The mythical value usually attached by states to the shape of their boundaries makes it extremely desirable, politically speaking, that boundary settlements acquire the element of effectiveness which an establishment of a "stable and final" boundary procures. Most boundary treaties, therefore, express the intention of parties to achieve this aim.[28] Treaties establishing a boundary are accordingly interpreted.[29]

Thus, the treaty of arbitration signed at Washington on July 16, 1930 between Guatemala and Honduras[30] was construed by the special boundary

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[25] See *S.C.O.R.*, 3rd., Year, 383rd. Meeting (December 2, 1948), pp. 10-11; but see the opinion of LAPRADELLE (*op. cit.*, p. 72) who finds that:

> "la délimitation est un principe fondamentale de l'Etat dans le droit international moderne. Recommandée au temps de Vattel, simplement constatée à titre d'usage par Klüber au XIXe siècle, elle se trouve, au début du XXe siècle affirmée comme une nécessité, une condition indispensable de l'Etat, qui faute de la remplir ne saurait être admis dans la Société des Nations.
>
> Facultative dans la Société des Etats, la délimitation est devenue dans la Société des Nations obligatoire, le bornage politique est devenu un droit pour l'Etat".

*Ibid.*, p. 72; but see LAUTERPACHT, Hersch, in *Recognition in International Law* Cambridge, Cambridge University Press, 1947; p. 30 and GUGGENHEIM, Paul, in *Traité de droit international public.* Geneva, Georg, 1953; p. 379.

[26] *Infra*, Chapter 2, Section A.

[27] "To recognize a political community as a state is to declare that it fulfills the conditions of statehood as required by international law" – LAUTERPACHT, *op. cit.*, p.6.

[28] CUKWURAH, pp. 121-127.

[29] In advisory opinion no. 12 (Iraq-Turkey boundary case) the P.C.I.J. stated that:

> "it often happens that, at the time of the signature of a treaty establishing new frontiers, certain portions of these frontiers are not yet determined and that the treaty provides certain measures for their determination . . . it is, however, natural that any article designed to fix a frontier should, if possible, be so interpreted that the result of the application of its provisions in their entirety be the establishment of a precise, complete and definitive frontier".

*P.C.I.J., Series B*, No. 12, p. 20.

[30] *U.N.R.I.A.A.*, vol. II, p. 1309.

Tribunal, appointed by those states to resolve a boundary dispute, as empowering the Tribunal to determine, to its full extent, the definitive boundary "to the end that the question of territorial boundaries may be finally and amicably settled." The Tribunal judged, according to this interpretation, that the possibility of a *non-liquet* was excluded, although the line of *uti possidetis* of 1810[31] between Guatemala and Honduras, which was described as the only possible boundary, could not be re-established, because of lack of adequate evidence.[32]

Likewise, the Franco-Siamese boundary treaty of March 23, 1907, the preamble of which recited that the parties were desirous of "ensuring the final regulation of all questions relating to the common frontiers of Indo-China and Siam" was amply interpreted by the I.C.J.[33] in the Temple of Preah Vihear case. The Court in this case also stated, independently of the question of treaty interpretation, that: "In general, when two countries establish a frontier between them, one of the primary objects is to achieve stability and finality".[34]

Formerly, the P.C.I.J., in the Iraq-Turkey boundary case, affirmed not only by way of construction of the intention of the parties, as expressed in Article 3(2) of the Treaty of Lausanne, of July 24, 1923[35] – which it found to be "by means of recourse to the Council, to ensure a definitive and binding solution of the dispute which might arise between them namely, the final delimitation of the frontier"[36] – but also by an independent statement on the stable nature of boundaries, that:

> "Not only are the terms used ('lay down', 'fixer', 'determiner') only to be explained by an intention to establish a situation which would be definitive, but furthermore, the very nature of a frontier and of any convention designed to establish frontiers between two countries imports that a frontier must

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[31] On the meaning and extent of this notion see *infra* Chapter 6, section B.

[32] *Op. cit.*, p. 1352.

[33] See *I.C.J. Reports*, 1962, p. 35.

[34] *Ibid.*, p. 34.

[35] This Article reads:
"The frontier between Turkey and Iraq shall be laid down in friendly arrangement to be concluded between Turkey and Great Britain within nine months.
In the event of no arrangement being reached between the two Governments within the time mentioned, the dispute shall be referred to the Council of the League of Nations.
The Turkish and British Governments reciprocally undertake that, pending the decision to be reached on the subject of the frontier, no military or other movements shall take place which might modify in any way the present state of the territories of which the final fate shall depend upon that decision".
*L.N.T.S.*, vol. 28 (1924), p. 11.

[36] *P.C.I.J., Series B.* No. 12, p. 19.

constitute a definite boundary line throughout its length".[37]

Traditional international law thus conceives of international boundaries as an important, integral part of a *status quo* regime, an instrument in the arsenal of rigidity[38]. As Professor Jennings put it:

> "The bias of existing law is toward stability, the status-quo, and the present effective possession; the tendency of International Courts is to let sleeping dogs lie. This is right, for the stability of territorial boundaries must always be the ultimate aim. Some other kinds of legal ordering need to be capable of constant change to meet new needs of developing society; but in a properly ordered society, territorial boundaries will be among the most stable institutions".[39]

The impact of this conception in the context of boundary-making, as this study abundantly demonstrates, is considerable.

## C. *PLAN OF THE WORK*

As delimitation is an optional operation, it is readily understandable why general international law does not contain any substantial imperative rules providing for delimitation[40] of land international boundaries[41]. Indeed, delimitation is an act of sovereignty[42] which does not normally involve legal considerations on the part of the parties concerned. In these circumstances the legal problem is that of the competence to delimit; not the question where a certain boundary will be fixed, but how this question will be determined and by whom. Consequently the following historico-juridical analysis of the ways and procedures by which international boundaries have been established over the present century has been developed through the optic of the competence issue, the purpose being not merely to verify the principle announced by Lapradelle to the effect that "seuls les etats limitrophes

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[37] *Ibid.*, p.20.

[38] Finality in this context does not mean eternal immovability. The international boundary is not a conception of *jus cogens*. Established by conventional procedure it is susceptible of change, but only by consent. The validity of an established boundary cannot otherwise be affected, and in this sense it is "stable and final".

[39] JENNINGS, Robert Y. *The Acquisition of Territory in International Law*. Manchester, Manchester University Press, 1963; p.70.

[40] See LAPRADELLE, p.88; STUYT, A.M. *The General Principles of Law as Applied by International Tribunals to Disputes on Attribution and Exercise of State Jurisdiction*. The Hague, Martinus Nijhoff, 1946; pp.26-41.

[41] The case of maritime international boundaries is somewhat of an exception to this effect; and see *infra*, chapter Four, Section C.

[42] CUKWURAH, pp.31-32.

ont compétence pour déterminer leurs limites, soit qu'ils l'excercent directement ou qu'ils en délèguent l'excercise à des puissances tierces"[43] but, rather, to clarify the subject in its light. As we tried to demonstrate herein, this principle actually dominates the whole subject; we therefore used the competence issue as the connecting link in this study.

Whereas the first three chapters hereunder relate to delimitation through acts – unilateral, conventional, judicial or otherwise – of various organs (States, Supra-National and International bodies, Courts, Tribunals, etc.,) the last chapter deals with normative regulation by international law which, *ex hypothesis*, does not involve problems of the same kind and could be treated completely apart. In fact, however, the difference is only apparent and this issue basically resembles the others, as all have a common denominator: delimitation, an operation affecting adjacent states in their mutual relations is in essence a conventional operation under contemporary international law. The last subject was, therefore, classified under "Chapter Four" and not "Part Two" herein.

[43] *Op. cit.*, p. 110.

# CHAPTER ONE

## DELIMITATION BY THE PARTIES

### *PREFATORY*

This chapter opens with a historico-juridical analysis referring to the practice of unilateral delimitation.

In the discussion of this topic a structural distinction was made between what may be termed as "original" and "revisionist" delimitation. The second method, as is demonstrated below, reflects a dynamic, imperialist conception of the international boundary and involves denouncement of the stability and finality principle. The first is mainly a means for defining territorial claims and involves no doctrinal considerations. As is consecutively explained, however, unilateral delimitation, whether original or revisionist, is not recognized as a valid means for establishment of international boundaries under International Law.

The second section in this chapter is organically connected with the first one because it refers to acts which are also unilateral in character and which express juridically operative consent on the part of states affected by unilateral delimitations. As is shown therein, international boundaries may validly be constituted through this process of unilateral acts which become effective upon communication on the part of all parties directly involved.

The third section herein relates to the normal, certain and reliable method of conventional delimitation and demonstrates, by an examination of contemporary practice, that it is the preponderate and practically irreplaceable device for establishment of international boundaries.

### SECTION 1 – UNILATERAL DELIMITATION

#### A. *THE DYNAMIC CONCEPTION*

The lineary notion of the frontier (the "boundary") appeared in Imperial Rome. The area subject to its political order having been progressively enlarged by territorial conquests, defence imperatives induced the Romans to construct fortified fronts, defensive lines, on the confines

of barbaric peoples. The *Limes Imperii*[1], thus established, were merely a place where the state put a halt to its authority; not the result of an agreement with neighbouring peoples, but the issue of unilateral Roman decisions. Such unilateral procedure would seem to be inherent to a dynamic, imperial conception of the boundary. Delimitation, a consensual operation, is an inconvenient procedure to the powerful, solitary state, which wants its territory "floating". "La délimitation, le tracé sur le terrain des lignes séparatives. . . ne se conçoit que dans un but de partage, et non d'occupation"[2].

Whereas delimitation is predominantly a conventional operation in traditional International Law, an examination of contemporary practice shows that legal orders estimating themselves "revolutionary" – especially such as are an expression of imperialist political conceptions – tend to adopt different procedures for fixation of their international boundaries. In the case of the Soviet Union territorial dynamism engendered unqualified opportunism in the choice of procedures for delimitation. In the case of Nazi Germany, on the other hand, the dynamic conception of the boundary found its expression in the practice of unilateral delimitation.

i) *The Dogma of "self-determination" and Soviet Practice of Delimitation*

At its inception, the Soviet State actually incarnated the dynamic conception.

Regarded as the nucleus of a future world state, it adopted constitutionally the theory of floating territory, permanently open in both

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[1] "Limes" – a Latin word, meaning originally "path", which came to mean especially a frontier of the Roman Empire (sometimes, but not invariably, an artificial frontier as opposed to a natural one). Traces of these frontiers survive in Europe, the Middle-East and North Africa. Earlier, the word "Limes" was applied to any Roman Military Road. These were driven forward into subdued forts, thus securing the country behind for further advance. Once a given line became regarded as a frontier rather than a lateral communication road, however, the towers and forts tended to be concentrated along it and the road between them was often replaced by a continuous barrier, though forts and limits ahead of or behind it were not necessarily abandoned. *ENCYCLOPAEDIA BRITANNICA*, 1969 ed., Vol. 14, p. 38.

[2] LAPRADELLE; *La Frontière*, p. 23.

directions of accession and secession[3], the final aim being to "wipe out boundaries between states, transform the world into one Cooperative Commonwealth, and realize the freedom and brotherhood of nations"[4].

Whereas the Russian delegation at Brest Litovsk, on January 1917 considered it "itsdduty to state:

> 1) The old frontiers of the Former Russian Empire, frontiers established by violence and aggression against the People, and in particular against the People of Poland, have fallen together with Tsarizm"[5]

and the Soviets thus denounced the rule of statessuccession in relation to international boundaries[6] the boundaries of the Soviet State had to be delimitated *de novo*.

For this purpose Soviet doctrine[7] espoused the concept of "self-determination". Indeed, Lenin, as early as 1917, stated:

> "The slogan 'down with boundaries' is an utter absurdity. National boundaries exist, and so long as they remain they must be determined by the will of the nation involved"[8].

Soviet approach to boundary problems, however, resulted in practice from pragmatic policies and had little foundation in doctrinal considerations. The "self-determination" dogma has thus been applied opportunistically, selectively and with various connotations, mainly as an instrument of territorial revisionism and a justification for boundary fixation through various "revolutionary" processes.

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[3]U.S.S.R. Constitution (1924), Part I:
"The will of the Peoples of the Soviet Republics recently assembled at the Congress of their Soviets, and there unanimously accepting the decision to establish the Union of Socialist Soviet Republics, serves as reliable guarantee that this is a union of equal peoples; that each republic is secured the right of freely withdrawing from the union; that entry into the Union is open to all Socialist Soviet Republics, both now existing and which may arise in the future".
*The Soviet Constitution.* Edited by ROTHSTEIN, Andrew. London, Publication for the Information Department of the Russian Trade Delegation, by the Labour Publishing Co. Ltd., 1923; YANEFF, Steffan. "*La Constitution de l'Union des Républiques Spécialistes Soviétiques.* Paris, M. Giard, 1926; p. 72.

[4]Platform adopted by the First Commintern Congress, 4.3.1918. English text in DEGRAS, *The Communist International,* Documents, vol. I, p. 19.

[5]DEGRAS, *Soviet Documents,* vol. I, p. 31.

[6]See *infra*, Chapter 4, Section I.

[7]For a meticulous examination of Soviet doctrine see BODAREZ, Jean-Yves, Doctrine de la Frontière en U.R.S.S., in "*Les Frontières Européennes de l'U.R.S.S.*", edited by DUROSELLE, Jean-Baptiste. Paris, Armand Lollin, 1957; pp. 1-24.

[8]LENIN, Vladimir I. *Selected Works in Twelve Volumes.* Translated from the Russian as issued by the Marx-Engels Institute, Moscow. London, Lawrence and Wishart, 1936-1939; vol. 5, pp. 309-311.

For example, it appears that the Soviet government considered valid an international boundary established by a unilateral act by virtue of the "principle of self-determination". This resorts from a declaration made by the Soviet government, dating January 11, 1944. In this declaration it was statedtthat:

> "The Soviet Constitution established a Soyiet – Polish frontier corresponding with the desires of the Western Ukraine and Western White Russia, expressed in a plebiscite carried out on broad democratic principles in the year 1939"[9].

In practice, however, no plebiscite ever determined the location of any Soviet international boundary[10]. On the contrary, at least on one occasion, that of the establishment by the U.S.S.R. and Nazi Germany of "the boundary of their respective interests in the territory of the former Polish state" was the "self-determination" dogma expressly neglected[11].

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[9] ROTHSTEIN, *Soviet Foreign Policy*, vol. II, p. 39. The motives inducing the Soviet government to issue this declaration were explained as follows:

> "Taking advantage of the difficult situation of the Soviet Country, Poland forced a different frontier upon us during the peace negotiations at Riga in March 1921... This injustice permitted by the Riga Treaty of 1921 in respect of the Ukrainians inhabiting Western Ukraine and the Bielorussians inhabiting Western Bielorussia, was rectified only in 1939, when, in accordance with the will of the population of these regions, expressed by a plebiscite effected on a broad democratic basis, the new Soviet Polish frontier was established."

Note on the Curzon Line, January 13, 1949. *Ibid.*, p. 40.

[10] For example, the unilateral acts referred to in the foregoing declaration, dated November 1, 1939 (Decrees of the Supreme Soviet incorporating parts of Eastern Poland into Ukrainian S.S.R. and White Russian S.S.R. – *Doc on Polish Soviet Relations*, pp. 69/70) dealt neither with a plebiscite nor directly with boundary delimitation, but with aggrandizement of the Soviet Union. – *Izwestia*, October 26, 1939; *U.S. For. Rel.*, The Soviet Union, 1933-1939, p. 785.

[11] The territorial settlement following the Molotov-Ribbentrop pact of August 23, 1939 had its basis not the "self-determination" principle but the mutual determination of spheres of influence in Eastern Europe.

While in the Brest-Litovsk peace negotiations the Soviet leaders paid tribute to the "self-determination" rights of the national groups of the German occupied territories, this aspect disappeared from German-Soviet relations during the first period of World War II.

Thus paragraph two of Article 2 of the secret protocol attached to the German-Soviet Non-Aggression Pact states that:

> "The question of whether the interests of both parties make desirable the maintenance of an independent Polish state and how such a state should be bounded can only be determined in the course of further political developments.
> In any event both Governments will resolve this question by means of a friendly agreement".

German – U.S.S.R., Frontier and Friendship Treaty, with confidential protocol, two secret supplementary protocols and declarations; signed at Moscow, September 28, 1939. – SHAPIRO, *Soviet Treaty Series*, vol. II, p. 209; *Nazi-Soviet Relations*, p. 105.

Whereas in terms of Soviet doctrine two possible forms are acceptable as manifestations of the desires of nations or populations[12] respectively through acts of supreme legislative organs or through plebiscites[13] the dogma of "self-determination" was also used as a criterion for the choice of parties to delimitation activities. But this was done in an incoherent, unconvincing manner.

A case in point relates to delimitation of the Finno-Soviet international boundary.

In December 1917 Stalin declared that "self-determination" should be accorded to "the representatives of the Finnish proletariat"[14].

Accordingly, on March 1, 1918 the Soviet government recognized the insurgent Finnish communists by signing a Treaty of Friendship with the "Finnish Socialist Republic of Workmen"[15]. This treaty sought, *inter alia,* to delimit the boundary between Finland and the U.S.S.R.[16].

A year later, in March 1919, when the Finnish revolution had proved illusory, Lenin insisted that the right of "self-determination" should rest with the entire Finnish nation[17].

Then followed the Treaty of Dorpat, of October 14, 1920[18]. This treaty stresses in its preamble that Russia has recognized the independence and sovereignty of Finland within the frontiers of the Grand Duchy of Finland, as declared by Finland in 1917 and, without any reference whatsoever to the principle of "self-determination" proceeds[19] to delimitation of the international boundary.

A similar episode again occurred 20 years thereafter.

On November 29, 1939 Soviet troops invaded Finland. In one of the Soviet occupied Finnish localities, a government of the People's Republic was formed. That "government" was recognized by the U.S.S.R. on December 2, 1939[20].

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[12]"Self-Determination", initially considered a prerogative of the "working masses", later became, conjointly and successively, a right of peoples or that of a population of a territory submitted to boundary modifications.

[13]BODAREZ, p. 14.

[14]"The Independence of Finland". Speech delivered in the All-Russian Central Executive Committee. December 22, 1917. STALIN, Joseph D. *Works*. Moscow, Foreign Languages Publishing House. 1953-1955, Vol. 4, p. 23 to p. 24.

[15]Treaty of Friendship; signed at Moscow on March 1, 1918. – SHAPIRO, *Soviet Treaty Series*, vol. I, p. 2.

[16]*Ibid.*, Article XV.

[17]LENIN, *op. cit.*, Vol. VIII, p. 341.

[18]Finland – R.S.F.S.R., Treaty of Peace. – SHAPIRO, *Soviet Treaty Series*, Vol. I, p. 69.

[19]Article II.

[20]DEGRAS, *Soviet Documents*, vol. III, p. 406.

On the following day a "Treaty of Mutual Assistance and Friendship" was signed between the "Finnish People's Republic" and the U.S.S.R. Article I of this treaty purported to delimit the international boundary *de novo*, as if a preceding Finno-Soviet treaty of non-aggression, dating January 21, 1932, did not: "guarantee the inviolability of the frontiers existing between the U.S.S.R. and the Republic of Finland, as fixed by the peace treaty concluded at Dorpat on October 14, 1920"[21]. Moreover, the fact of having signed the treaty with the "Government of the Finnish People's Republic" did not deter the Soviets from contracting, three months later, a new delimitation treaty with that which was described in the preamble of the first treaty as "the former plutocratic power in Finland"[22]. By the peace treaty of Moscow (March 12, 1940) the boundary between the Soviet Union and Finland was delimited once again[23].

Any perusal of Soviet practice regarding delimitation would demonstrate the feebleness of the "self-determination" dogma.

Actually, though the notion of "self-determination" continues to play the principal role in Soviet doctrine, its application is subordinated to more urgent practical needs.

Many of the delimitation agreements it concluded made reference to the principle of "self-determination" in various contexts[24] but on no

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[21] SHAPIRO, *Soviet Treaty Series*, Vol. II, p. 46.

[22] The preamble reads: "The presidium of the Supreme Soviet of the U.S.S.R. on the one side, and the government of the Democratic Republic of Finland on the other, being convinced that now, when the most dangerous seat of war, which had been created near the borders of the Soviet Union by the former plutocratic power in Finland to please the plutocratic powers, is being eliminated through the heroic struggle of the Finnish people and through the efforts of the Red Army of the U.S.S.R., and when the Finnish people has formed its democratic republic, the time has come to establish lasting friendly relations between ourcountries and insure by joint efforts the security and inviolability of our states; ...with a view to a favorable and mutual settlement of frontier problems ... aiming to strengthen the spirit and fundamental principles of the peace treaty of October 23, 1920, based on the mutual recognition of state independence and non-intervention in the internal affairs of the other party, found it necessary to conclude the following treaty. . ." *Ibid.*, p. 217.

[23] *B.F.S.P.*, Vol. 144, pp. 383-88.

[24] Thus, the peace treaties with Estonia (Art. 2, Treaty of Tartu, February 2, 1920 (*Soviet Treaty Series, op. cit.*, p. 34); with Georgia (Art. I, Treaty of Moscow, May 7, 1920, (*ibid.*, p. 44); with Lithuania (Art. I, Treaty of Moscow, July 12, 1920 (*ibid.*, p. 50); with Latvia (Art. II, Treaty of Riga, August 11, 1920 (*ibid.*, p. 54) all refer to the principle of "self-determination" in the context of Soviet recognition of the independence of those states, not in that of boundary delimitation (international boundaries were established in all those treaties).

The peace Treaty of Riga, March 18, 1921 (*ibid.*, p. 105) contains a reference tothe principle of "self-determination" in a different context. In this treaty (Art. II) the R.S.F.S.R. and Poland recognized the Ukraine and Byelorussia as independent states on the basis of this principle. Following the delimitation of the Polish, Russian and Ukrainian boundaries both Poland and Russia renounced any claims to the territories East and West of the demarcation lines.

In some treaties, ethnographical considerations were enumerated among the principles to be complied with by demarcation commissions. Thus, while Article II of the Riga treaty of peace with

occasion was an international boundary delimited by the Soviet Union by virtue of an objective application of this "principle". This concept can hardly be considered, therefore, as a legal norm, even in the special context of Soviet international law. Indeed, it is an extra legal consideration opportunistically adopted by a revisionist legal system based on a doctrinal universal tendency. Whereas this tendency gradually disappeared as the U.S.S.R. finally adopted the figure of a normal state[25] its practice regarding delimitation became regular and conforming with the traditional doctrine. Indeed, after World War II all the delimitations concerning international boundaries of the U.S.S.R. were operated conventionally through direct negotiations with the directly affected parties, as represented by their lawful governments.[26]

ii) *The Lebensraum Theory and Nazi Practice of Delimitation*

The aspiration to "natural boundaries", stemming from another revolutionary dynamic conception of boundaries[27] gave birth, in contemporary history, to the territorial conception of great spaces with directing states. In contradiction to the political theory of "International frontiers", described as "the zone in which the Great Powers expanding along their main lines of communication to the limits of their political and economic influence and defence needs, impinge upon each other in conflict or compromise",[28] the Nazi *Lebensraum* theory implied juridical consequences in the matter of boundary making, for it would seem that the procedure of unilateral fixation of boundaries was part of the territorial conception of great *Lebensraums* with directing states, and that the *Reich* was competent to establish unilaterally its boundaries within the *Lebensraum*.

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Poland describes the boundary in detail, it further provides that: "A mixed delimitation commission . . . shall be entrusted with the duty of determining the details of the above frontier line and of tracing it on the spot, as well as of fixing the frontier marks. In marking the frontiers, the mixed delimitation commission shall conform to the following principles.

. . . b) When the frontier has been defined by lines which are not strictly determined and when precise information is lacking, attention shall be paid, during the actual marking of the frontier, to ethnographical considerations".

[25] Note that the clause of free entry into the Union is altogether omitted from the current Constitution. Article 17 merely declares:

"The right freely to secede is reserved to every Union Republic". – PEASLEE, *Constitutions of Nations*, Vol. III, pp. 989-1007.

[26] See *infra*, this Chapter, Section 3.

[27] HITLER, Adolf. *Hitler's Secret Book*. New York, Gpv. Press, 1961, pp. 14-16.

[28] D. Hall, "The International Frontier" in *A.J.I.L.*, Vol. 42 (1948), p. 42; Fawcett outlined a similar concept, describing the "power frontier" as "an area of inward or outward pressure between two power systems" (J.E.S. Fawcett, "Intervention in International Law." *R.d.C.*, Vol. 103 (1961-2), pp. 343-421, at p. 348).

Thus, it was by unilateral decisions that the German government modified its boundaries to incorporate certain territories on which it had particular reclamations, and which it militarily occupied. On May 18–23, 1940, the territories of Eupen, Malmédy, and Morsenet were incorporated with the German *Reich* by virtue of decrees issued by the *Führer*. The decrees proclaimed that these territories will not be considered as occupied enemy territories and that the *Reich's* Minister of the Interior would determine the tracing of the boundaries of the *Reich* after the incorporation.[29]

Similarly, Hitler's Decree on the Organization and Administration of Incorporated Eastern Territories, of October 8, 1939, entrusted the "Reich Minister of the Interior, in agreement with the Prussian Minister-President", to establish "administrative boundaries between territories restored to the homeland and adjacent provinces".[30]

In the area the *Reich* considered subject to its authority, it was also competent to fix, by unilateral, administrative acts, boundaries of other states. Thus Hitler's directives for splitting up Yugoslavia dealt with boundary making. Article II of the directive of April 12, 1941[31] charges "the supreme command of the armed forces, in agreement with the foreign office, the commissioner for the four year plan, and the Reich Minister of the Interior" with this task.

From the point of view of traditional International Law, it is extremely difficult to explain such unilateral decisions, the rule being that transfer of territorial sovereignty does not result from the mere fact of military war-like occupation.[32] Moreover, the dynamic conception denotes a denial of one of

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[29] A) Hitler's Decree incorporating the Territories of Eupen, Malmédy and Morsenet with the German Reich:

"The lands severed from the German Reich by the Diktat of Versailles and incorporated in Belgium are once again in German hands. At heart they have always remained united with Germany. Hence they must not be regarded and treated as occupied enemy country even for a temporary period. Therefore I now decree:

I

The territories of Eupen, Malmédy and Morsenet which were severed from the German Reich by the Diktat of Versailles are once again incorporated as component parts of the Reich."

B) Hitler's decree implementing the above decree, May 23, 1940:

"To implement my decree of May 18, 1940, on the reunion of the territories of Eupen, Malmédy and Morsenet with the German Reich, I decree as follows:

*Article I* The territories named in section I of the decree include the former Prussian provinces of Eupen and Malmédy, as well as neutral Morsenet, and those parts of the territories lying on the frontier which fell to Belgium in the course of boundary settlements following the Diktat of Versailles. The Reich Minister of Interior shall decide in detail how the boundary line shall be drawn".

*Doc. on Int. Aff.*, Vol. II, Hitler's Europe, pp. 193-4.

[30] *Ibid.*, pp. 238-9.

[31] See *Ibid.*, p. 329.

[32] Note that the procedure of unilateral delimitation was resorted to mainly in war situations. The fact that no resort was made to it in peacetime probably denotes that this procedure was regarded obsolete in situations other than conquest.

the basic characteristics of international boundaries – stability and finality.[33]

Any dynamic conception of boundaries is, therefore, *ab initio* contrary to the conception of international boundaries in traditional International Law. Procedures of unilateral fixation, stemming from such dynamic conceptions, are thus faulty from their inception. But this defect applies only to the case of boundary changes, not to that of original delimitation. Unilateral limitation, however, is not a procedure resorted to by imperialist states only. Contemporary history knows of attempts to employ it in order to fix boundaries on territory hitherto never delimited, notably when title to such territory is not yet established. Such is, for example, the case of purported delimitations of Polar regions.

## B. *ORIGINAL DELIMITATION THROUGH UNILATERAL ACTS*

The procedure of unilateral limitation has frequently been resorted to by states wishing to ascertain title over territories hitherto unappropriated by any other state. In the 19th century this was a common practice employed in function of territorial acquisitions in Africa, in cases when the state resorting to such procedure met with no adverse pretention of territorial sovereignty.[34] The same procedure has been applied in our time (but in various, sometimes different connotations) for fixation of boundaries in Polar regions.

* * *

The sector theory, which recognizes the right of a state to territories which do not consitute a part of another state but stand in particular geographical relationship to the claiming state[35], was employed for partition of Arctic lands.

As announced, on November 4, 1924, by Chicherin, People's Commissar for Foreign Affairs of the U.S.S.R.[36], this doctrine meant that all islands in the Artic, North of the coast of the U.S.S.R., were declared by the Soviet government to be a part of Soviet territory unless the islands were at that time

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[33] *Supra,* Introduction, B (3).

[34] See HERTSLET, E., *The Map of Africa by Treaty,* 3rd. edition. London, stationary office, 1896.

[35] This theory signifies that a state possessing territory within the Artic cycle, contiguous to areas that extent to the North Pole which are unpossessed by another state, may claim all of the land between a base line connecting the meridians of longtitude marking the limits of its Easterly and Westerly frontiers as far as North as the final intersection of those meridians at the North Pole.

[36] Circular Note from Chicherin to all Governments on the Ownership of Islands in the Artic. 4 November, 1924. DEGRAS, *Soviet Documents,* Vol. I, p. 476.

territory of another state. A decree of the Central Executive Committee of the U.S.S.R. of April 15, 1926, defined the extent of the claim.[37]

Although such definitions are conceived in lineary terms, claims to Arctic territory based on the sector theory have nothing to do with establishment of boundaries. The geographical character of Arctic expanses generally excludes the possibility of international boundaries. Such lines are only geometric devices used as a method for measuring the geographical extent of a claim, having no legal value in themselves.

In contrast to Artic expanses, projection of lines over the Antartic, implies establishment of boundaries. As the Antartic is a continental mass, application of the sector theory to it might constitute not only a territorial claim but, equally and corrolarly, boundary fixation.

Geographically, these areas offer, however, no room for consideration of the sector theory on the basis of continuity or continguity. Nevertheless, claims to extensive areas in the Antarctic were made by a sector system; no available base facing the Antarctic cyle existing, another system is resorted to. An arc is produced extending from the South Pole, embracing between its longtitudinal lines the full areas within which discoveries or explorations or taking of possession have been made on behalf of the claimant state. Territorial sovereignty is then claimed over the area enclosed, the longtitudinal lines being its boundaries.

Sector lines must, then, bear a rather close relationship to the area in which the acts of discovery and possession of the continent proper have taken place. Such was generally the practice. The only state which made territorial claims in Antarctica and apparently rejects the sector principle is Norway, for it decided the extent of its claims not in function of such acts but by reference to the limits of other states' claims.[38] This procedure is meant, however, primarily to define the extent of the territorial claim and not to establish international boundaries. As such, it is similar to most other

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[37] The decree reads: "Are declared as forming part of the territory of the U.S.S.R. all lands and islands, already discovered, as well as those which are to be discovered in the future, which at the moment of the publication of the present decree are not recognized by the U.S.S.R. as the territory of any foreign state and which lie in the Northern Frozen Ocean North of the coast of the U.S.S.R. up to the North Pole, within the limits between the Meridian Longtitude 32° 4' 35" East from Greenwich . . . and the Meridian Longtitude 168° 49' 30" West from Greenwich" (*Izwestia*, Moscow, 16 April, 1926. Text in BREITFUSS, L. "Die Territoriale Sektoreinteilungder Arktis". *Petermans Geographische Mitteilungen* (GOTHA), Vol. 74 (1948) pp. 23-28.

[38] Norway, Order in Council (Royal proclamation of January 14, 1939): "That part of the mainland coast in the Antarctic extending from the limits of the Falkland Islands Dependencies in the West (boundary of the Coats land) to the limits of the Australian Antarctic Dependency in the East (45 degrees East Longtitude) with the land lying within this coast and the environing sea, shall be brought under Norwegian sovereignty" (U.S. Naval War College, *International Law Documents*, 1948-9, Washington, 1950, p. 243.)

claims, defined in geometrical terms, which made no such references.[39]

The only state which meant, by such administrative, unilateral acts, not to assert a territorial claim, but exclusively to fix boundaries on territories it considered already national is, according to its own explanation[40], Chile.

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[39] Great Britain has proceeded in this way to claim an extensive area, "the Falkland Island Dependencies", embracing also some minor islands outside the Antarctic cycle, which was assigned to the Falkland Islands. Letters Patent of July 21, 1908 (*B.F.S.P.*, Vol. 101, pp. 76-77) defines the sector claim for the first time; Letters patent of March 28, 1917 (*Ibid.*, Vol. III, pp. 16-17) further delimits this sector. It defines the claim as "all Islands and Territories whatsoever between the 20th degree of West Longtitude which are situated South of the 50th Parallel of South Latitude and all islands and territories whatsoever between the 50th degree of West Longtitude and 80th degree of West Longtitude, which are situated South of the 58th Parallel of South Latitude".

Again, this procedure was resorted to in order to lay claim to what is known as the Ross dependency, embracing the area from the South Pole to the 60th degree of South Latitude, between the 160th degree of East Longtitude and the 150th degree of West Longtitude, and this area was assigned to New-Zealand. Order in Council, July, 30, 1923 (See *U.S. Naval War College, op. cit.* p. 235).

Likewise, Order in Council of February 7, 1935, established the Australian Sector out of British claims, placing under the authority of the Commonwealth of Australia "All the islands and territories other than the Adelie land which are situated South of the 60th degree of South Latitude and lying between the 160th degree of East Longtitude and the 45th degree of East Longtitude" (See *Statutory Rules and Orders*, 1933, 2089). The order was to become effective on such date as might be fixed by proclamation by the Governor-General of the Commonwealth of Australia following Australian legislation providing for the "acceptance of the said territory and the government thereof".

France in 1924 made claim to the Adélie land, attaching it to the government general of Madagascar. Décret of April 1, 1938 (*Journal officiel*, Paris, April 6, 1938, No. 82, pp.4098-4099) titled "Limites des territoires Français de la région Antarctic dite 'Terre Adélie' ", asserts French sovereignty over the islands and territories situated between the 136th and 142nd degrees of East Longtitude, South to the 60th degree of South Latitude (English text in *U S. Naval War College, op. cit.* pp. 230-231).

The first definite official Argentine pronouncement on the boundaries of its claim was in a note of June 5, 1946, on the Republic's "indisputable right to the lands situated South of the 60th Parallel between the Medidians of 25° and 68° 34' of West Longtitude".

On November 19, 1946, was published Décreto No. 9.844 of September 2, 1946 (*Boletin Oficial*, Buenos Aires, 19 November, 1946). Article 7 defines the limits of Argentine Antarctic Claims.

Likewise, on March 12, 1947, the National Commission of the Antarctic (created by a Presidential decree of July 15, 1930, see *U.S. Naval War College, op. cit.*, p.219) issued a publication in which the Argentine sector is described as "that situated between the 25th and 74th Meridians of Longtitude West of Greenwich, to the South of 60 degrees South Latitude" (*loc. cit.*).

[40] The Chilean Presidental Decree of November 6, 1940, thus announced that: "Considering:

That it is the duty of the state to fix its boundaries with precision;

That up to the present the boundaries of Chilean territory in the direction that it is prolonged into the Polar region called the American Antarctic have not been made precise;

That this Ministry gave public notice in 1906 that the delimitation of the above mentioned territory was the subject of studies which had been begun, but which were not yet completed;

That the present state of such studies permits a determination to be made with respect to this matter;

That the Special Commission named by Decree . . . of this ministry has established the boundaries of the Chilean Antarctic territory . . .

Decrees:

The Chilean Antarctic Territory is formed by all lands, islands, islets, reefs, pack-ice, etc., known and to be discovered, and their respective territorial seas, lying within the limit of the sector constituted by the meridians of 53 degrees longtitude West of Greenwich and 90 degrees West of Greenwich"

Moreover, Chile's claim is theoretically based not on the sector theory but on the colonial rights of the Captaincy-General of Chile to "Southern territories".[41] Chile holds that it succeeded to these rights by virtue of the *uti-possidetis* principle.[42] As such, the Chilean claim is analogous to Argentina's basic claim as successor to the Vice Royalty of La Plata by virtue of the same principle.

On the basis of this principle these two states consider that a "South American Antarctic, included between the meridians of 25 degrees and 90 degrees Latitude West of Greenwich"[43] exists, and that the only countries with exclusive rights of sovereignty over it are themselves. Consequently the two states, on March 4, 1948, expressed the desire to "pursue negotiations until the signing of a Chilean-Argentine treaty of demarcation of the limits in the South American Antarctic".[44]

The validity *erga omnes* of limits thus established will depend, however, on the validity of the claims to territorial sovereignty. Relying on the *uti possidetis* principle for this purpose is a shaky argument, for this concept applies to territories formerly possessed by Spain in Latin America.[45] Claims to territories never possessed by Spain cannot be based on it.[46]

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(see U.S. Naval War College, *op cit.*, p.224). This decree was communicated, *inter alia*, to the government of Japan, which made a reservation of its rights in a note of November 13, 1940. The Chilean government, refusing to accept this reservation, declared that:

> "it is clearly established that the aforementioned Decree did not assert our claims to zones which could be considered *'res nulius'*, but rather marked a frontier line in definitely Chilean lands and seas whose boundaries were till then undetermined". *Ibid.*, p.225.

[41] See HAYTON, R.D. "The 'American' Antarctic". *A.J.I.L.*, vol. 50 (1956), p.583, at p.584.

[42] DE LA BARRA, O.P. *Chilean Sovereignty in Antarctica.* Santiago, 1955.

[43] Argentina-Chile. *Declaracion conjunta relativa a la Antarctica Sudamericana, firmando el 12 de Julio de 1947.* Argentina, Ministerio de relaciones Exteriores y Culto, Boletin, Jan., 1948, 3(25), p.156. (English text in *U.S. Naval War College, op.cit.*, pp.226-227).

[44] *Ibid.*, p.227.

[45] For an examination of the meaning, object and extent of *"uti-possidetis"* see *infra*, Chapter four, section 2.

[46] This problem has thus been treated by the arbitrator in the Clipperton Island Award (*A.J.I.L.*, vol. 26 (1932), p.390. at p.393):

> "According to Mexico, Clipperton Island . . . had been discovered by the Spanish Navy and, by virtue of the law then in force, fixed by the Bull of Alexander VII, had belonged to Spain, and afterwards, from 1836, to Mexico as the successor state of the Spanish state. But according to the actual state of knowledge, it has not been proved that this island had been actually discovered by the Spanish navigators . . . however,

## C. *THE QUESTION OF VALIDITY OF UNILATERAL DELIMITATION*

In the fisheries case[47] the I.C.J. stated that:

> "The delimitation of sea-areas has always an international aspect; it cannot be dependent merely upon the will of the coastal state as expressed in its municipal law. Although it is true that the act of delimitation is necessarily a unilateral act, because only the coastal state is competent to undertake it, the validity of the delimitation with regard to other states depends upon international law".[48]

The Court in this case was dealing with the question of determination of national maritime boundaries. The tendency of states to enlarge their territorial sea limits by unilateral acts has an effect of encroaching upon the norm of international law which provides for the freedom of the high seas. This is why "it has always an international aspect". The Court's statement, in this respect, does not apply in the case of land international boundaries, where different considerations prevail.

But the distinction made by the Court between the act itself, which is not illegal, and the validity of the delimitation with regard to other states applies in the case of land as well as in that of maritime boundaries, for in both cases it "depends upon international law". Transposed from municipal to international law, the act of limitation becomes valid as delimitation only upon consecration according to the latter system's normative requirements.[49] Producing reciprocal effects delimitation is *a priori* an operation requiring assent of both parties.

Whereas the establishment of national maritime boundaries directly affects the international community as a whole, the question of the validity of a unilaterally fixed alignment as an international boundary affects, directly, only the limitrophe state (or states).

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even admitting that the discovery had been made by Spanish subjects, it would be necessary, to establish the contention of Mexico, to prove that Spain not only had the right, as a state, to incorporate the island in her possession, but also had effectively exercised this right. But that had not been demonstrated at all".

[47] Judgment of December 18, 1951. *I.C.J. Reports*, 1951, p.116.

[48] *Ibid.*, at p.151.

[49] "The delimitation could not be achieved by norms belonging to the legal order of one state, since every such order is limited in its validity to the territory and the people of that state. The delimitation must originate in a normative order whose territorial and personal sphere of validity of comprises the territorial and personal spheres of validity of all the national legal orders. The only normative order we know of that fulfills this requirement is international law".
KELSEN, Hans, *General Theory of Law and State*, Cambridge, Massachussetts, Harvard University Press, 1949; p.350.

International law, however, sometimes makes concessions to situations of fact, applying the maxim '*ex facto oritur jus*'. A conventional or customary norm may take into consideration the combination of some facts and attach legal effect to it. A line fixed by unilateral act may thus acquire validity as an international boundary owing to consideration of acts or omissions on the part of limitrophe states, although such an effect could not be acquired by the unilateral act in itself. The parties to a boundary dispute themselves may wish to consider such facts.

Thus, in the British Guiana – Venezuela arbitration, the arbitrators were instructed that "in determining the boundary line, if territory of one party be found by the Tribunal to have been at the date of this Treaty in the occupation of the subjects or citizens of the other party, such effect shall be given to such occupation as reason, justice, the principles of international law, and the equities of the case shall, in the opinion of the Tribunal, require"[50] ; even though the facts referred to were consequent to a unilateral setting of the boundary by the British.[51]

In the Walfisch bay arbitration between Germany and Great Britain,[52] Germany contested the validity of a unilateral demarcation of the boundary in question.

The territory had been acquired and its boundaries unilaterally defined in March 1878,[53] years before any civilized state established itself in the adjacent region. But the boundary was demarcated in 1885 when Germany was already established therein The British argued that the demarcation represented "exactly the boundaries of the territory of which Great Britain took possession on the 12th March, 1878".

The arbitrator, who had full discretionary powers,[54] interpreted the British Annexation Proclamation of the 12th March, 1878, and found that the demarcation fixed the boundary referred to accurately. He therefore decided that "it must be accepted, in future, by virtue of this arbitral award, as the exact definition of the frontier under discussion" [55]

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[50] Article 4.b(c) of the Washington Treaty, February 2, 1897. MARTENS, *N.R.G.*, 2e.Sér., Vol. 28, p.328

[51] *A.J.I.L.*, Vol. 43 (1949), p.523, at p.524.

[52] See MARTENS, *N.R.G.*, 3e.Sér., Vol. 6, p.296.

[53] See HERTSLET, E., *The Map of Africa by Treaty*, Vol. I, pp. 175-6.

[54] Article I, Arbitration Agreement, Berlin, January 30, 1909. See MARTENS, *N.R.G.*, 3e.Sér., Vol. 2, p.705; *A.J.I.L.*, off. doc. 1909, p.306.

[55] MARTENS, *loc.cit.*

This is not acceptance of the validity of unilateral delimitation. Quite the contrary – the Arbitrator stated that:

> "although the accuracy with which the demarcation was carried out is proved by all the preceding arguments, it does not follow from this that it had binding force of any kind on Germany, who, as the Power conterminous with the territory of Walfisch Bay at the time of the demarcation, could only be bound thereby so far as either she took part in it or gave her assent to it, since there is no juridical principle which applies the effect of a demarcation to States, which, being directly interested in it, have not consented to accept its consequences".

The arbitrator ruled, accordingly that "the demarcation of the Southern boundary of the territory of Walfisch Bay carried out . . . in 1885 is not binding on Germany on the ground that that Power did not take part in it and did not give her assent to it subsequently".[56] This is an independent decision, motivated by a wish not to unduly upset an existing order. *Quieta non movere.*

## SECTION 2: RECOGNITION, ACQUIESCENCE AND "ESTOPPEL"

"Law is a product of social reality, it cannot lag for long behind facts".[57] The notions composing the title of this section represent a concession made by law to situations of fact, necessary because "it is a settled principle of the law of nations that a state of things which actually exists and has existed for a long time should be changed as little as possible".[58]

As such, these concepts are, concurrently, dynamic and stabilizing elements. "The explanation lies in the contradiction between the basically static character of International Law and the highly dynamic nature of the international society. In it, continuously, changes take place which, *per se*, do not commit other states unless they are willing to acknowledge in binding form the legal implications of such changes in the *status-quo*".[59]

Recognition, Acquiescence and other related concepts based on tacit accord have this in common, in that they all produce the same legal effect between conterminous states; i.e., these are means by which a situation or transaction becomes opposable *vis-à-vis* the limitrophe state, against which it could not otherwise be invoked.

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[56] MARTENS, *N.R.G.*, 3e.Sér. Vol. 6, p.396 at p.446.

[57] LAUTERPACHT, Hersch, *Recognition in International Law*. Cambridge, Cambridge University Press, 1947; p.426.

[58] Statement of the Permanent Court of Arbitration in the Grisbadarna case, 1909. *A.J.I.L.*, Vol. 4, (1910), p.233.

[59] SCHWARZENBERGER, Georg, "The Fundamental Principles of International Law". *R.d.C.*, Vol. 87, (1955), p.191 at p.244.

The effect *in rem* of such manifestations of a juridically operative consent on the part of a state is special in the present context because an international boundary, once duly established between conterminous states, acquires general opposability and universal validity in International Law.

> "The frontier question is particularly one which, though obviously concerned with title in the fullest sense of the word, is normally one which for practical purposes arises only between neighbouring states. It is *par excellence* the type of case where a decision who has the better right of neighbouring claimants is a decision *erga omnes*".[60]

It follows that consent on the part of the limitrophe state (or states) is constitutive, because a boundary not opposable to that state is not an international boundary according to International Law. Conversely, acts, omissions or declarations of third states can only have the value of evidence in the case of a dispute between adjacent states.

The effect of opposability as against conterminous states is, thus, far reaching. It remains, however, to examine whether, and how, Recognition, Acquiescence and similar institutions can operate so as to produce this effect in the present context.

## A. *RECOGNITION*

In the present context, recognition is undoubtedly discretionary. This flows logically from the facultative nature of delimitation.[61]

An act which becomes effective by unilateral communication to the addressee either by *expresis verbis* or *concludenter*, recognition is a matter of intent. Its mode and scope is entirely determined by the expressed or implied intention of the recognizing state. The formative stage of the process is thus legally irrelevant.[62]

In view of the optional and relative character of recognition, the following discussion was developed casuistically, not in order to contribute to the study of recognition in International Law, but only in order to explore such cases as are subject to rules *sui generis* in the present context. Through the examination of some pertinent, acute problems it is thus proposed to elucidate the subject in an illustrative, pragmatical manner.

### i) *The effects of Recognition of National boundaries: The Oder – Neisse Case*

In order to produce the effect referred to above, recognition must inten-

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[60] JENNINGS, p.13 And see McNAIR, Arnold D. *The Law of Treaties* Oxford, the Clarendon Press, 1961; pp.256-259; *I.L.C.*, 16th session. Third Report on the Law of Treaties by Sir Humphrey WALDOCK, Special Rapporteur. U.N. Doc. *A/CN.4/147*, pp.60-80, at p.73.

[61] *Supra*, Introduction, B (2).

[62] SCHWARZENBERGER, *op.cit.*, p.254

tionally apply to the international boundary between the two countries as such. Recognition by one state of the national boundaries of another state does not validate these boundaries as international.

Thus, the Treaty between Poland and the Federal Republic of Germany, signed on December 7, 1970, in Warsaw is material as to questions of territorial status, but does not constitute an international boundary between these two states, since it merely acknowledges[63] that "*the existing boundary line*, the course of which is laid down in Chapter IX of the decisions of the Potsdam Conference of August 2, 1945 . . .*shall constitute the western state frontier of the People's Republic of Poland*". (My italics; I.B.)

According to the Polish view, the international boundary had already been established in the Potsdam agreement.[64] Recognition by the Federal Republic could have, if such was the case, a probative value only. This is all the more true since, owing to Poland's recognition of the German Democratic Republic, the Federal Republic is a third party in this context. The international boundary having, however, been established in the Potsdam agreement, no need arises, according to this view, to delimit it in a Treaty between Poland and the German Democratic Republic.

Accordingly, on June 6, 1950, the governments of Poland and of the G.D.R. signed in Warsaw a declaration announcing the conclusion of frontier executive agreements between them, wherein it is stated that:

> "the two parties have decided to settle within one month by way of an agreement, the demarcation of the fixed and existing state frontier on the Oder and the Lusathian Neisse, together with the matter of frontier passages, small frontier traffic, and navigation in the waters of the frontier belt".[65]

According to Klafkowski[66] "The nature of this declaration is not constitutive, since it refers to the provisions of the Potsdam agreement, recognizing the Polish-German frontier as 'fixed and existing between the two states'."

An objective analysis of the Potsdam agreement makes it clear, however, that it contains nothing to support the Polish claim.

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[63] Text published by the West-German government, November 20, 1970 (unofficial translation in the *International Herald Tribune*, November 21-22, 1970).

[64] See, for example, KLAFKOWSKI, Alfons. *The Potsdam Agreement*. Warsaw, PWN-Polish scientific publishers, 1963; "Forms of State recognition of state frontiers after the second World War". *Polish Western Affairs*, Vol. 4, 1963/5, p.209; LACHS, Manfred, *The Polish-German frontier: Law, Life and Logic of History*. Warsaw, Polish scientific publications, 1964; WIEWIORA, Boleslav, *Polish-German Frontiers in the Light of International Law*. 2nd ed., Poznan, Institute Zachodny, 1964.

[65] *Selected Documents on Germany*, pp.133/4.

[66] KLAFKOWSKI, A., *The Potsdam Agreement*, p.246.

It was merely stated at Potsdam in relation to Poland's western boundaries (Polish and German questions were separately dealt with at Potsdam) that:

> "The following agreement was reached on the Western frontier of Poland.
>
> In conformity with the agreement on Poland reached at the Crimea Conference the three Heads of Government have sought the opinion of the Polish Provisional Government of National Unity in regard to the accession of territory in the North and West which Poland should receive. The three Heads of Government reaffirm their opinion that the final delimitation of the Western frontier of Poland should await the peace settlement.
>
> The three Heads of Government agree that, pending the final determination of Poland's Western frontier, the former German territories east of the line running from the Baltic Sea immediately west of Swinmüde, and thence along the western Neisse to the Czechoslovak frontier, including that portion of East-Prussia not placed under the administration of the U.S.S.R. in accordance with the understanding reached at this Conference and including the area of the former free city of Danzig, should be under the administration of the Polish state and for such purposes should not be considered as part of the Soviet zone of occupation in Germany".[67]

Polish writers maintain that the words "the former German territories East of the line running. . ." are crucial to the question of the international boundary, and that the rest of the declaration, notably the statement about "final delimitation" is formal in this context.

West German doctrine confronts the statement that "the final delimitation of the Western frontier of Poland should await the peace settlement" with the statement that the territories east of the Oder and Western Neisse line "should be under the administration of the Polish state and for such purposes should not be considered as part of the Soviet zone of occupation in Germany"; concluding that the statement as to "the former German territories east of the line. . ." is provisional, and that pending the signing of a peace treaty, German territory is defined by the declaration of the Four Powers of June 5, 1945 (regarding the assumption of supreme authority over Germany)[68], as well as by the Protocol of September 12,

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[67]Communiqué, Potsdam, August 2, 1945 (*U.S. For. Rel.*, Conference of Berlin (Potsdam) 1945, Vol. II, p.1499, at p.1509.)

[68]*Selected doc. on Germany*, pp. 134-5.

1944 (describing the zones of occupation)[69], which both relate to Germany as "within her frontiers as they were on the 31st December, 1937".[70]

It would seem, however, that these acts do not delimit the German boundaries in a general context, but only affirm the competence of the Big Powers to dispose of German territories so defined[71], which they ulteriorly did in Potsdam.[72]

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[69] Under the agreements concluded in the European Advisory Commission on the occupation and control of Germany (protocol regarding the zones of occupation and administration in Germany and the administration of Greater Berlin, signed at London, September 12, 1944, as amended by the further agreement signed at London, November 14, 1944 – texts in *U.S. For. Rel.*, the Conferences of Malta and Yalta, 1945, pp. 118, 121, 124) the controlling Powers agreed that the zones of occupation should be created out of Germany within her frontiers as they were on the 31st December, 1937.

[70] See WAGNER, Wolfgang. *Die Entstehung der Oder-Neisse Linie*, Stuttgart, 1955; KAUFMANN, Erich. *Deutschland's Rechtslage unter der Besatzung*, Stuttgart, K.F. Kochler, 1948.

[71] Within the scope of Supreme Authority over Germany the Great Powers conferred themselves with full competence to settle future German boundaries, and the right to dispose of German territory.

> The Preamble of the June 5, 1945 declaration reads:
> "The governments of the United Kingdom, the United States of America and the Union of Soviet Socialist Republics, and the provisional government of the French Republic, hereby assume Supreme authority with respect to Germany, including all the powers possessed by the German government, the high Command and the state, municipal, or local government or authority. The assumption, for the purpose stated above, of the said authority and powers does not effect the annexation of Germany.
>
> The governments of the United Kingdom, the United States of America and the Soviet Socialist Republics, and the provisional government of the French Republic, will hereafter determine the boundaries of Germany or any Part thereof and the status of Germany or of any area at present being part of German territory".

*Doc. on Germany under Occupation*, p. 30.

[72] The Potsdam agreement clearly extracts the "*former* German territories" (italics mine, I.B.) . . . "from the Soviet zone of occupation". Moreover, it is historically clear that the big powers intended to extend Polish territory to the North and West, at the expense of "German territories as to the 31st December, 1937." (See RHODE, Gotthold and WAGNER, Wolfgang. *The Genesis of the Oder Neisse Line in the Diplomatic Negotiations during World War II, Series and Documents*. Stuttgart, Brentano Verlag, 1959). Controversial were only the extent of this expansion, and the date of the transfer under Polish sovereignty, as this transfer was not operated at Potsdam.

Telegram from the Acting Secretary of State to the Political Adviser in Germany, Washington, July 9, 1945: (at) "the Crimea Conference . . . it was . . . agreed that at a subsequent time Poland should receive an increase of territory in the West but this government has not accepted any specific line and has not agreed to a date for the transfer of German territory to Poland" – *U.S. For. Rel.*, Conference of Berlin (Potsdam), 1945; p.756.

Territorial questions aside, neither the Yalta (Crimea) nor the Potsdam agreement (the latter being executive of the former in this context) define the Polish-German international boundary. The interpretations of Polish writers who claim that the words "final delimitation" express demand of formal recognition[73] or final tracing on the ground[74] – inconstitutive acts which have been partly performed as between Poland and the German Democratic Republic[75] – have no basis in the language of the agreements. Moreover, the only reference to boundaries therein can be found in the affirmation that their definition must await the peace settlement. Polish writers, claiming that this is merely a formal provision, exclude from the substantive part of the text any reference to boundaries. The statement as to the "former German territories" relates, in fact, exclusively to questions of territorial status.

On July 6, 1950, Poland and the German Democratic Republic concluded a demarcation treaty – "on the basis of the Potsdam Agreement which established the frontier on the Oder and the Lusathian Neisse" – by which they recognized "the fixed and existing frontier".[76]

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[73] See KLAFKOWSKI, "The forms of state recognition of State Frontiers after the second World War." *Polish Western Affairs*, Vol. 4; pp.209-222.

[74] WIEWIORA (*op.cit.*, pp 119-122) introduces an erroneous interpretation of the term "delimitation", giving it the meaning of "demarcation", and thus tries to overcome the insurmountable difficulty of the phrasing of the Potsdam Communiqué:

> "The practice of states – as also a number of authors – tends to support the concept in which delimitation denotes nothing more than a technical function... There is nothing in the Potsdam agreement to indicate that the concept of delimitation was intended to have a broader significance, different from that accepted in general practice. On the contrary, it follows unequivocally from the context of the Potsdam agreement... that "final delimitation" could have meant nothing but the formal technico-judicial function of tracing the frontier on the ground, feasible only after the state of war had been terminated. It follows that the substance of the Polish-German frontier was settled in the Potsdam agreement"

However, delimitation is not the physical act of tracing a line on the ground, but definition of the boundary only. Furthermore, the reference in the communiqué to "final determination" as well as to "final delimitation" denotes that its authors did not change "delimitation" for "demarcation".

[75] "The following legal acts constitute an implementation of the Potsdam agreement provisions concerning the Polish-German frontier:

1) Declaration of the government of the Polish Republic and the government of the German Democratic Republic on the demarcation of the fixed and established Polish-German frontier on the Oder and Neisse, signed at Warsaw on June 6, 1950.

2) The Treaty between the Polish Republic and the German Democratic Republic concerning the demarcation of the Polish-German frontier, signed at Zgorzelec on July 6, 1950.

3) The act concerning on the ground demarcation of the frontier between Poland and Germany, signed in Frankfurt on the Oder on January 27, 1951."

KLAFKOWSKI, *The Potsdam agreement*, p.246.

[76] *Selected Doc. on Germany*, pp.134-5.

Article I reads:

> "The High Contracting parties are agreed that the established and existing frontier running from the Baltic Sea along a line west of the locality of Swinnoujscie (formerly Swinmüde) and then along the Lusathian Neisse to the confluence of the Lusathian Neisse and along the Lusathian Neisse to the Czechoslovak frontier, constitutes the state frontier between Germany and Poland".

Under normal circumstances, such phrasing could have been constitutive.[77] But it should be noted that such effect would depend, in this specific case:

1) On the status of the German Democratic Republic and its treaty-making capacity at the time.[78]
2) On the competence of Poland and the German Democratic Republic to conclude a delimitation treaty between them, in view of the right of the Great Powers to determine "the western boundaries of Poland" (Potsdam Agreement) and "the boundaries of Germany" (Declaration of June 5, 1945, on Assumption of Supreme Authority over Germany).

Moreover, Article I of the July 6, 1950 treaty between Poland and the G.D.R. refers to the "state frontier between *Germany* and Poland" (my italics – I.B.), undoubtedly meaning "Germany as a whole".[79] But the Democratic Republic was never recognized by any state as representing "Germany as a whole" (the German Democratic Republic itself considers it is only one of two existing German states). A Polish-German international boundary could not, thus, be established by virtue of a bilateral act between Poland and the G.D.R.

On the whole it should be noted that reference to the Oder-Neisse line in the 1970 Warsaw Treaty between Poland and the Federal Republic of Germany is indeed a special case wherein, owing to special political and legal circumstances, recognition could not possibly be made in relation to the international boundary. The formula of recognition of the "Western State

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[77] Such was not the opinion of the authors of this treaty; the treaty refers in its preamble to the provisions of the Potsdam Agreement and 5 out of 8 of its Articles refer to the Oder and Lusathian Neisse line as "the State frontier between Poland and Germany".

[78] In considering this question proper attention should be accorded to the fact that the treaty had been registered with the U.N. Secretariat and published by it. See *U.N.T.S.* No. 4631, Vol. 319, pp.11-93. Cf. also HIGGINS, Rosalyn. *The Development of International Law Through the Political Organs of the United Nations.* London, Oxford University Press, 1965, p.331.

[79] As the treaty refers to the Potsdam Agreement, in which reference was made to Germany as a whole; See KLAFKOWSKI, *The Potsdam Agreement.*

Frontier of the People's Republic of Poland" was, in these circumstances, the only possible issue; and it was certainly intentionally adopted in order to acknowledge the validity of post-war territorial changes without, at the same time, referring to the international boundary with its reciprocal implications. Thus the parties avoided the inextricable issue of the status of territories *west* of the Oder-Neisse line while, at the same time, relating to the status of the territories lying *east* of that line.

ii) *Recognition of States and Recognition of Boundaries*

In the Jaworzina affair[80] the Permanent Court of International Justice advised that:

> "The clauses relating to the immediate recognition of the sovereignty of the states concerned over the territories. . . . pre-suppose the existence of a territory defined and delimited in all respects, especially in relation to the other state".[81]

This statement is merely interpretative of "*The* clauses" of the Conference of Ambassadors' decision,[82] and does not have a general applicability. It should not, therefore, be interpreted as bearing implications on the question of recognition of international boundaries. In the context of the immediate subject it is, rather, useful to consider the practice of International Organizations. Indeed, such an examination demonstrates that recognition of a state does not imply recognition of its international boundaries.

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[80] *P.C.I.J.*, Series B, No.8.

[81] *Ibid.*, p.32.

[82] A clause of the last paragraph of Article I of the decision signed by the representatives of the British Empire, France, Italy and Japan reads as follows:

> "The United States of America, the British Empire, France, Italy and Japan hereby decide and declare that from this date the sovereignty of Poland and Czechoslovakia respectively shall extend to the territories situated on either side of the frontier line laid down above." (*ibid.*, p.27)

This clause, which was considered by the Court "as recognition of the sovereign rights of Poland and Czechoslovakia over the territories respectively alloted to them" (*loc. cit.*), defined the territories as lying "on either side of a frontier line"; not, as could alternatively be done, by description of their spatial extent, but by lineary devices. The court, therefore, correctly stated that "these clauses pre-suppose the existence of a territory defined and delimited in all respects".
And see *Supra, Introduction,* B (2).

a) *The case of Albania*

In the practice of International Organizations it happened that states had been admitted as members while their boundaries were not yet delimited. Such was the case of Albania, admitted to the League of Nations before delimitation of its international boundaries. Again, such was the case of Israel as regards its admission to the United Nations.

The practice of the League as regards Albania's admission constituted a change of conception.

As a matter of fact, existence of international boundaries was deemed a condition *sine qua non* for admission of new members to the League by the Fifth Commission of the Assembly, charged with the task of examining demands for admission[83].

Nevertheless, the directives of the Commission were not followed by the first Assembly when it came to deal with Albania's application.

The creation of an independent state of Albania was agreed upon by the Great Powers, in principle, at the end of the second Balkan war, in 1912. The treaty of London, of May 17/30th, 1913 (Article 3) reserved to the Great Powers "the task of settling the frontiers of Albania and any other questions regarding Albania"[84].

Accordingly, the question of delimitation of Albania's boundaries was submitted to the Conference of Ambassadors, which decided to create a delimitation Commission. The Commission concluded its work by a final protocol signed at Florence on December 17th, 1913, but the Big Powers, because of the breaking out of World War I, failed to consummate it. The frontiers of Albania (which became a Republic in 1914) were thus left undelimited.

From 1920 onwards, Albania entered into relations with the League of Nations, to which it asked to be admitted.

The Fifth Commission of the Assembly, which dealt with the question of Albania's application largely in function of the problem of its boundaries,

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[83] The Commission established the following criteria to appreciate requests for admission:

"a) Was its application to the League in order?
b) Was the Government applying for admission recognized de Jure or de Facto and by which states?
c) Was the applicant a nation with a stable Government and settled frontiers? What were its size and its population?
d) Was it fully self-Governing?
e) What had been its conduct, including both acts and assurances, with regard to (i) its international obligations (ii) the prescriptions of the League as to armaments?".

League of Nations, Records of the First Assembly Meetings of the Committees, 11. *Minutes of the Fifth Committee*, First meeting, November 20, 1920, p.157, at p.159.

[84] MARTENS, *N.R.G.*, 3e.Sér., Vol.8 (1915), p.16; *B.F.S.P.*, Vol.107, p.656.

was "of opinion that the admission of this state should be postponed until the International Status of Albania has been fixed"[85].

The Assembly, however, unanimously granted the request by its decision of December 17, 1920[86]. "In admitting Albania the Assembly had expressly realised that its frontiers had not been definitely fixed, it had been generally agreed that she had been admitted without prejudice to the frontier question"[87]. Accordingly "the Assembly, by its unanimous vote of October 2nd, 1921, left the task of settling the Albanian frontiers to the Principal Powers"[88].

b) *The Case of Israel*

By Resolution 181 (ii) of November 29, 1947, the General Assembly recommended "to the United Kingdom, as the Mandatory Power of Palestine, and to all other members of the United Nations, the adoption and implementation, with regard to the future Government of Palestine of the plan of Partition with Economic Union"[89]. This plan, based upon the recommendations of the United Nations Special Committee on Palestine (UNSCOP)[90] envisaged erection of two independent states, one Arab and one Jewish, in Western Palestine (west of the river Jordan).

The recommended plan, which described in detail the boundaries of the two states[91] was accepted by the Jewish Agency for Palestine (which had an official status, as provided for in the Mandate Agreement and, accordingly, was recognized by the United Kingdom as official spokesman for the Jewish population of Palestine) and, following proclamation of the state of Israel, by its provisional government.

But the plan was rejected by Arab states, as well as by the Arab High Committee (which, although not mentioned in the Mandate Agreement, was considered by the Mandatory Power as representing the Arab population[92].)

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[85] *Op.cit.*, 6th Meeting, December 4, 1920; p.184, at p.191.

[86] League of Nations, *Records of the First Assembly*. Plenary Meetings. 28th Plenary Meeting, December 17, 1920; p.641, at pp.643-651.

[87] *Minutes of the Fifteenth Meeting of the Council*. Mr. Fischer, Rapporteur. *L.N.O.J.* (September 1921) p.722.

[88] *P.C.I.J., Series B.*, No. 9, p.10.

[89] See *G.A.O.R.*, 2nd Session, Resolutions, no. 181 (ii), November 29, 1947.

[90] U.N.S.C.O.P., report to the General Assembly (*G.A.O.R.*, 2nd Session, Supplement II) U.N. Doc. *A/364*, 3 September, 1947. p.18.

[91] See Part II of plan recommended by the Assembly on its 135th Plenary Meeting, on May 14, 1948.

[92] United Nations Press Release, *PAC/112*.

Moreover, the plan was not supported by the Mandatory power. The United Nations Palestine Commission estimated itself, therefore, unable to implement the Assembly's resolution[93]. Consequently, the United States withdrew, for the time being, the support for Resolution 181 (ii) and suggested establishment of a temporary trusteeship over Palestine[94].

On May 14th, 1948, however, the Mandate was terminated by operation of the United Kingdom Palestine Act, 1948, and the declaration of independence set the new state of Israel on its independent existence. On the same day the General Assembly decided to appoint a United Nations Mediator and defined his powers and functions[95].

On the following day the Egyptian government informed the Security Council that its troops had entered Palestine to maintain order and the Arab League notified the Council that Palestine was independent and that Arab States were intervening to prevent the development of a threat to the peace[96]. Egypt, Saudi Arabia, Iraq, Syria and Lebanon, in answer to a questionnaire sent to them by the Security Council, indicated that their forces were operating inside Palestine. In reply to a question, the Arab Higher Committee, on May 24, 1948, stated that it had requested assistance from the members of the Arab League. The Committee thus reaffirmed its earlier position, that the Arabs claimed authority over the whole of Palestine, and that forces opposing them were unlawful. The reasoning of the Arabs, then, was based on inacceptance of the Partition Resolution.

In these circumstances the parts of Resolution 181 (ii) recommending delineation of the Israeli-Arab international boundaries were not consummated

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On January 19th, 1948, this Committee telegraphed the Secretary General that it was "determined to persist in rejecting partition and in refusal recognize Resolution this respect and anything deriving therefrom." This was followed by a detailed statement of the position of the Arab Higher Committee on February 6, 1948, which also stated that "a. The Arabs of Palestine will never recognize the validity of the exorted partition recommendations or the authority of the United Nations to make them."
(U.N.P.C., First Special Report to the Security Council: the problem of security in Palestine; United Nations Doc. *A/21/9*, 16 February, 1948, pp.5,6.)

[93] U.N.P.C., Report to the General Assembly; United Nations Doc. *A/532*, 10 April, 1948, p.39.

[94] *S.C.O.R.*, 3rd Year, 27th Mtg., 19 March, 1948, p.168.

[95] General Assembly *Resolution 186 (s-2)*.

[96] Telegrams of May 15th, 1948 from the Egyptian government and from the Arab League. *S.C.O.R.*, 3rd Year, No. 66, 22nd Mtg., 15 May, 1948, p.3, and Supplement for May 1948, p.83; See also similar telegram from Jordan, *Ibid.*, p.90.

by assent of the limitrophe states and the question remained open[97].

Accordingly, the Mediator, in the proposals he subjected on June 27, 1948, to the belligerents for "a possible approach to the peaceful adjustment of the future situation of Palestine"[98] suggested that they should agree upon the boundaries. In his Report to the third session of the General Assembly meeting in Paris in September 1948 he submitted[99] that:

> "(4) The frontiers of the Arab and Jewish states should be established through agreements between the parties. If this is not possible, the United Nations should assume responsibility and establish boundary Commissions."

Evidently, therefore, the Mediator considered the question open.
On May 15th, 1948, in notifying the Secretary-General of the United Nations of the independence of Israel, the foreign minister of the provisional government expressed Israel's desire to become a member of the Organization[100]. The formal application, however, was submitted on November 1948[101].

In the ensuing discussion in the Security Council[102] the question arose whether Israel was a "state" as the term is used in Article 4 of the Charter, albeit its lack of international boundaries.

The representative of the United States (Dr. Jessup) declared that in the opinion of his government, the state of Israel fulfilled the requirements set out in the Charter; stressing that the question of existence of precisely delimited boundaries is immaterial to the question of existence of a state[103].

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[97] Resolution 181 (ii) was not, of course, by itself constitutive of international boundaries.

> "Resolutions of the General Assembly do not normally create a legal obligation for the members of the United Nations (even if Israel and the proposed Arab State had been members at that time, which they were not); and the Partition Resolution did not have a legislative character . . . the boundaries laid down for the territories of the proposed Jewish and Arab states and for the internationalized city of Jerusalem have no permanent legal force. The position would, of course, have been otherwise had the Resolution been fully adopted by the interested parties as the *de facto* basis for their co-existence. But at the moment when the resolution failed to be implemented, its description of specific boundaries ceased to be fully relevant. . . As a description of a particular boundary they became worthless"

LAUTERPACHT, Elihu, *Jerusalem and the holy places*, London, The Anglo-Israel Association, 1968; pp.16-21.

[98] Progress Report of the United Nations Mediator in Palestine, United Nations Doc. *A/648;* p.6.

[99] *Ibid.*, p.5. [100] *S.C.O.R.*, 3rd Year, Supplement for May 1948, pp.88/9.

[101] *Ibid.*, Supplement for December 1948, p.118.

[102] See. *S.C.O.R.*, 3rd Year, Nos. 128-30, 383rd-86th Mtgs, 2, 15, and 17 December, 1948.

[103] *Ibid.*, 383rd Mtg, 2 December 1948, pp.10-11.

In the same meeting the British delegate objected to the application, arguing that it was immature because, *inter alia*:

> "The ultimate fate or at least the ultimate shape of the state of Israel remains to be determined and is not yet known . . . Dr. Jessup . . . admitted that it was true that the frontiers of Israel have not yet been fixed. I would add further, that the prospects are that these frontiers will not be fixed for some time to come. Why then all this haste over this application which seems to me so premature. . .?"[104]

At the Council's 384th meeting on December 15th, 1948, the same representative said that, as soon as the major questions at issue, notably the question of the frontiers in Palestine, had been resolved under the auspices of the Conciliation Commission appointed by the General Assembly, his government would give sympathetic consideration both to its own recognition of the Jewish state and to that state's application for membership in the United Nations.

The matter was put to vote on December 17th, 1948[105]. There were 5 votes in favour, 1 against and 5 abstentions. The request was therefore not recommended by the Security Council. It would seem that the attitude of the abstaining states was, on the whole, not of refusal but rather of caution, pending further clarification of the general political situation.

Accordingly, on February 24th, 1949, the day of signature of the General Armistice Agreement between Israel and Egypt at Rhodes, Israel requested that renewed consideration be given to its application for membership in the United Nations[106].

The Armistice Agreement stipulated (Article V) that:

> "1). The line described in the Article VI of this Agreement should be designated as the Armistice demarcation line. . .
>
> 2). The Armistice Demarcation line is not to be construed in any sense as a political or territorial boundary, and is delineated without prejudice to rights, claims and positions of either party to the Armistice as regards ultimate settlement of the Palestine question.
>
> 3). The basic purpose of the Armistice Demarcation line is to delineate the line beyond which the armed forces of the respective Parties should not Move"[107].

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[104] *Ibid.*, p.16.

[105] *Ibid.*, 386th Mtg.

[106] *S.C.O.R.*, 4th Year, Supplement for March 1949, p.7.

[107] See United Nations Documents, *S/1264 Corr. I, S/1264 Add.I*; see also *S/1296/Corr.I; S/1296/Add.I* (Lebanon); *S/1302; S/1302/Corr.I, S/1302/Add.I* (Transjordan).

The frontiers of Israel thus remained undefined. Nevertheless, the Security Council, by 9 votes to 1 (Egypt), with the United Kingdom abstaining, recommended Israel's admission to membership[108]. The application was then forwarded to the General Assembly which, on May 11th, 1949, adopted, by 37 votes to 12 with 9 abstentions, Resolution 273 (iii), admitting Israel to membership in the United Nations[109].

iii) *Recognition of Delimitations Operated by Contested Authorities*

a) *The question of the "MacMahon Line": Recognition of Delimitations Operated by Imperfect Subjects of International Law.*

The competence to conclude delimitation agreements is an attribute of statehood, as well as of full territorial sovereignty over the areas of which delimitation is sought. Apart from the question of their treaty-making capacity in general, therefore, the competence of imperfect subjects of international law to delimit international boundaries is conditioned upon their relations with the parent state (or other organ) as to this specific matter. Unless recognized by the latter, a line defined in a bilateral agreement to which the former only was a party will fail to acquire general opposability as an international boundary.

Thus, the soundness of the Indian contention that the "MacMahon line" – established in March 24/25, 1914 by an agreement between British India and Tibet as their respective boundary[110] -- is valid as a Sino-Indian international boundary (since delimitation treaties of an extinct state[111] devolve on the absorbing state), depends on the status of Tibet *vis-à-vis* China at the time.

As a matter of fact, the "McMahon line" is an issue of the Simla tripartite Conference, which was convoked, on October 1913 to January

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[108] *S.C.O.R.*, 4th Year, Nos. 16-17, 3-4 March, 1949. The President ruled that, in accordance with the principle established by the Council concerning resolutions subject to the unanimity rule, abstention by a permanent member did not render the council's decision invalid. *Ibid.*, No.17, p.14.

[109] *G.A.O.R.*, 3rd Session, 2nd Part, 207th Plenary Mtg., p.330. The recommendation had been adopted by the *Ad hoc* Political Committee by 33 votes to 11 with 13 abstentions. *Ibid.*, Annexes: p.65.

As to other cases of admission to membership albeit undefined boundaries see HIGGINS, Rosalind, *The Development of International Law through the Political Organs of the United Nations.* London, Oxford University Press, 1963; pp.17-20.

[110] See exchange of notes between McMahon and the Lönchen Shatra. AITHISON, *India Treaties*, Vol. XIV, pp.34/35; Reproduced in LAMB, Alistair. *The MacMahon Line.* London, Routledge and Kenan, 1966; Vol. II, p.620.

[111] By the Sino-Indian Agreement of April 29th, 1954, Tibet was described as a "region of China". See *Foreign Policy of India: Texts of Documents.* Lok Sabha Secretariat, New Delhi, October, 1958.

1914[112] mainly in order to deal with this problem. Whereas China considered, and considers, Tibet as an integral part of itself[113], Britain undoubtedly considered that Tibet was under Chinese Suzeraintee[114].

What exactly this androgynous notion, a relic of Feudal law which does not harmonize with the modern notion of a state, denotes is hard to decide *a priori*. The exact nature of the relationship between vassal and suzerain depends upon the details of each individual case, and examples could be quoted of vassal states enjoying some treaty-making power.

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[112] See LAMB, A. *The McMahon Line*, Vol.2 pp.477-566 for detailed account on its proceedings.

[113] On this ground the Chinese maintain that:

> "It is absolutely indisputable that the Tibet local authorities had no right to enter into talks and conclude treaties, on its own, with foreign countries. Tibet is part of Chinese territory, China has full sovereignty over Tibet. Without the authorization and consent of the Chinese central Government, the Tibet local authorities had no right to hold talks and conclude treaties with foreign countries; even if these were done, they were illegal and null and void. Even the British Government of the past dared not ignore this. A case in point is the British-Tibetan Covention of 1904 . . . It may be recalled that, after compelling Tibet to sign this Convention, Britain still asked time and again the Chinese Government to sign and approve it. The question became a subject of repeated negotiations, and it was not until 1906 that it came to a close when another Convention was concluded between China and Britain and the above-mentioned British-Tibetan Convention was annexed to it. As for the secret letters regarding the so-called McMahon line exchanged between the British representatives and the representatives of the Tibet local authorities at the time of the 1914 Simla Conference, they were exchanged behind the back of the Chinese central government and kept secret for a long time. Moreover, during the Simla Conference, the Chinese Government already made a general statement on its non-recognition of any treaty or similar document that might be signed between Britain and the Tibet local authorities. Those letters exchanged, therefore, are all the more illegal and null and void".

*White Paper No. IV* (March 1960 – November 1960), p.14.

[114] This is implied in the Convention between Great Britain and China relating to Sikkim and Tibet, signed at Calcutta on March 17, 1890 (see AITCHISON, *Op.cit.*, Vol. XII (1931), pp. 66/67), Article I of which defined the boundary between Sikkim and Tibet; as well as by the Convention between China and British India respecting Tibet, signed at Peking on April 17th, 1906 (see G.E.P. HERTSLET, *Treaties, etc., between Great Britain and China; and between Great Britain and Foreign Powers*, 2 Vols., London, 1908, Vol. I, pp.202-208.); and expressly recognized by the Convention between Great Britain and Russia, relating to Persia, Afghanistan and Tibet, signed at St. Petersburg on August 31st, 1907 (McMURRAY, *China Treaties*, Vol. I, pp.674-678). Article V states that: "The Governments of Great Britain and Russia recognizing the Suzerain rights of China in Tibet. . .".

Article II adds that: "In conforming with the admitted principle of the Suzeraintee of China over Tibet, Great Britain and Russia engage not to enter into negotiations with Tibet except through the intermediary of the Chinese Government".

These provisions could be argued *res inter alios acta* to China. However, they explain the British eagerness to achieve a tripartite agreement at Simla. The Chinese were chiefly interested in confirmation of their privileged status in Tibet. This is why the Simla draft agreement, which the India Office had proposed on March 7, 1913, read as follows: "The two Governments (China and Britain), recognizing that Tibet is under the suzeraintee, but not the sovereignty of China, mutually engage to respect the territorial integrity of the country and to abstain from interference in its internal administration which shall remain in the hands of the Tibetan Government of Lhasa" (*FO 371/1610*, no. 10751, 10 to FO, March 7th, 1913).

The final document of the Simla Convention, which was initialled by the plenipotentiaries of Britain, China and Tibet on April 27th, 1914 went even further: "The Governments of Great Britain and China, recognizing that Tibet is under the Suzeraintee of China. . ." (See. *The boundary question between China and Tibet*, Peking, 1940; pp.133-139.) China's refusal to sign the agreement probably debars her from invoking this provision as a concession. But it would appear that the successive agreements above referred to irrevocably prove the British opinion as to the matter.

Thus India contends that:

> "Under International Law a vassal state could conclude international agreements with third states with the knowledge and expressed or implied consent of its Suzerain state. This was amply borne out by state practice. Thus Egypt and Bulgaria had concluded, on their own, treaties with foreign governments, although they were under Turkey's Suzeraintee. Bulgaria in fact had at the Hague Peace Conference ratified a declaration forbidding the launching of projectiles and explosives from balloons, even though Turkey had not ratified it"[115].

India alleges, on various grounds[116], that Tibet was endowed with such capacity and, therefore, that:

> "whether Tibet had been a Vassal or not in 1914, the validity of the 1914 agreement and the Simla Convention and their binding nature on Tibet, and on China since 1950, could not be affected. The arrangements for the Simla Conference, where the three parties had had equal plenipotentiary status, had been made with the full knowledge and consent of China. The fact that China was prepared to conclude a treaty 'jointly' with Tibet established clearly that Tibet had had the power to conclude treaties with other countries, and even with her own Suzerain, namely China"[117].

Nothing in the Indian contentions, however, supports the view that Tibet had a competence to conclude, independently, delimitation agreement.

Thus, the British certainly considered that China had something to say in the matter since, already in 1890, they signed a treaty with China by which (Article I) the boundary between Sikkim and Tibet was delimited[118]. True, the Tibetans refused to recognize it as effective in Tibet, as it had been signed by the Chinese only. Accordingly, Tibet and Britain signed in 1914, a Convention the preamble of which states that it was concluded to "resolve" the "doubts and difficulties (which) have arisen as to the meaning and validity of the Anglo-Chinese Convention of 1890 . . . and as to the liabilities of the Tibetan Government under these Agreements" (by this treaty the boundary between Sikkim and Tibet as defined in the former Sino-British Agreement was, nevertheless, recognized). It is possible to conclude from this provision that it "carries the clear implication that any treaty concluded by China on behalf of Tibet could not be binding on the latter, and would not be implemented by her"[119].

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[115] *Report of the Officials*, p.132.

[116] *Ibid.*, pp.128-132.

[117] *Ibid.*, p.133.

[118] Convention of March 17, 1890, between Great Britain and China, *op.cit.*

[119] RAO, K.K. "The Sino-Indian boundary question and International Law". *I & C.L.Q.* Vol. II, (1962), p.375 at p.398.

Still, this would only suggest that the government of British India considered the said boundary had to be delimited by India, China and Tibet. But the quoted provisions negate the Indian conclusion that "it was . . . beyond doubt that in 1914 Tibet had had the right to conclude boundary agreements on her own"[120].

The 1914 Agreements, the two initialled versions of the Simla Convention[121] and the Anglo-Tibetan notes of March 24/25, 1914, which formalized the "McMahon Line" could not be constitutive of an international boundary in default of Chinese adherence. This line could acquire validity only through some form of act or omission on the part of China which would bar her from contesting it; i.e., such behaviour as would make it opposable to China.

b) *Recognition of Delimitations Operated by "Protecting" Powers*

In the Temple case[122], dealing with a boundary dispute between Cambodia and Thailand, the International Court of Justice largely referred to treaties concluded by France and to the conduct of French authorities.

Cambodia being part of French Indo-China until 1953, the date of its accession to independence, and its foreign affairs having been conducted by France, as Protecting Power, the Court estimated it self-evident that the Protected State, having regained the plenitude of its international competence, may prevail and is bound by the conduct of the Protecting Power in matters of boundary delimitation. Accordingly, there is no legal basis for policies of non-recognition of boundaries on the ground that these are "consequences of imperialist policies"[123]; at least not when alignments have a clearly regular contractual basis.

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[120] *Report of the officials*, p.135.

[121] The Tibetan, British, and Chinese delegates initialled these texts on April 27, 1914. Thereupon the Chinese government repudiated the action of its representative. On July 3, 1914, the Tibetan and British delegates, after attempts to persuade China to modify her attitude had failed, initialled the Convention and signed a declaration to the effect that they would abide by its terms, the benefits of which would be denied to China.

[122] *I.C.J., Rep.*, 1962.

[123] This is one of the grounds Communist China invokes to justify its policy of non-recognition respecting boundary lines on its peripheries (see for example, *White Paper I*, p.53; *White Paper II*, p.63). Thus China consistently demands renewed definition of its boundaries with all its respective neighbours, and has even accepted the same alignment which was produced in "imperialist" epoque, provided that its validity springs from "post-imperialist" agreements (e.g. the Sino-Burmese Agreement of October 1st, 1960, where the Chinese accepted part of the McMahon line; but they did so, they said, because it seemed a good alignment, not because it was the McMahon line. See text in *Peking Review*, No. 40, October 4th, 1960; see also text of Sino-Nepalese Agreement of October 5th, 1961, *Peking Review*, no. 41, October 13, 1961).
And see *Infra*, Chapter Four, Section 1.

iv) *The Question of Declarative or Constitutive Recognition in the light of the Intrinsic Nature of the Concept of Delimitation; Effectiveness and the Time Element*

It is true that:

> "Just as before the rise of international law, boundaries of lands were necessarily determined by the fact that the power of a state was exercised within them, so, too, under the reign of international law, the fact of peaceful and continuous display is of the most important considerations in establishing boundaries between states"[124].

Such considerations may, eventually, inspire judicial bodies charged with the task of resolving a boundary dispute[125].

It is submitted, however, that physical facts by themselves, of whatever nature they may be, cannot be constitutive of international boundaries unless coupled with some psychological elements implying consent[126]. To this effect it is indispensable to examine the conduct of all limitrophe states; unless these are debarred from contesting the validity of a particular alignment as an international boundary, a policy of non-recognition on their part is perfectly legal, no matter how effective was the alignment and how long it factually existed.

This issue is the fundamental point of cleavage between India and China in the boundary dispute opposing them.

The Chinese insist that:

> "an international boundary signifies a demarcation line up to which neighbouring states exercise their sovereignty over their respective territories, and must be jointly defined by the states concerned"[127].

Conversely, the Indian government contends that:

> "formal definition or demarcation is not necessary for recognition of a boundary so long as it is fixed by custom and tradition and is well-known"[128].

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[124] Max Huber in the Palmas case (SCOTT, *Hague Court Reports*, p.83, at p.93).

[125] See, for example, the Walfisch Bay Arbitration. *Op.cit.*; The Grisbadarna Arbitration, 1909, *op.cit.*, at pp.129-132; The Guatemala-Honduras Arbitration, 1933; *UNRIAA*, Vol. II, p.1307 at p.1352.

[126] "Dans les contestations relatives au tracé des frontières les considérations d'effectivité dans l'exercise des fonctions étatiques tiennent moins de place qu'ailleurs." VISSCHER, Charles de. *Les effectivités du droit international public*. Paris, A. Pedone, 1967; p.111. For illustrations see pp.112/3 therein.

[127] Note given by the Ministry of Foreign Affairs, Pekings, to the Embassy of India in China, 3 April, 1960. *White Paper No. IV*, p.9.

[128] Note of the Indian Government. *White Paper III*, p.82.

According to the Indian conception:

> "Delimitation is a general term for the formation of the precise alignment which is recognized to separate two countries. The process and method of delimitation vary according to historical circumstances. It may be by delineation on a map or by demarcation on the ground, or by precise definition in the form of co-ordinates of nodal points or prominent features along the alignment in a descriptive statement or by a formal delimitation in a negotiated bilateral instrument embodying the agreed definition of the boundary But apart from all these, the boundary may also be delimited by historical process; and it is such a process of historical delimitation which is relevant to a traditional boundary, such as that between India and China. A traditional boundary takes shape on the basis of the natural features of the area, and is later recognized through a process of acknowledgement spread over centuries of custom and tradition. Much later, it may be confirmed by delineation, demarcation, definition or even formal delimitation, but . . . such confirmation is not necessary to its validity. Formal Agreements, though essential for artificial boundaries, are optional in the case of a boundary based on natural features, which had been traditionally recognized. Unlike artificial boundaries, traditional boundaries are delimited through impersonal factors without human intervention and derive their sanctity from recognition over the centuries by the peoples and governments of the countries concerned. A distinction, therefore, obviously exists between delimitation of a boundary in the sense of its being clear, valid, and well known and a formal delimitation through a negotiated instrument"[129].

Accordingly, the Chinese, who contend that the Sino-Indian boundary had never been delimited between the two countries[130], refuse to recognize any "traditional" alignment valid as their international boundary with India. They assert that even if a "traditional" boundary was undisputed, it would still require to be settled by a boundary Agreement through joint survey[131]; i.e. by a procedure of discussions involving "friendly consultation" and "joint negotiations" on the basis of "mutual understanding and mutual accommodation"[132].

The Indian side have never suggested that this alignment (the common "traditional and customary" boundary between the two countries) has its original sanction in a detailed boundary agreement, as "India had never claimed that a boundary agreement covering the whole alignment existed"[133]. But they claim that "The Chinese side. . . should recognize the traditional boundaries are valid and that the emphasis on formal delimitation is optional and not

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[129] Concluding chapter of the *Report of the Officials*, p.52.

[130] See note given by the Ministry of Foreign Affairs of China to the Embassy of India in China, 26 December, 1959. *White Paper III*, p.60 at pp.61-66.

[131] *White Paper No. IV*, p.9.

[132] *White Paper No. III*, p.55.

[133] Concluding chapter of the *Report of the Officials*, pp.47, 49.

essential in establishing the location and validity of traditional boundaries . . . the facts . . . demand respect for this boundary defined by nature, confirmed by history and sanctioned by the laws of nations"[134].

Boundaries, however, are not a natural but a social phenomenon. As to history, this is not a directly relevant factor in the present context[135]. It is only the conduct of limitrophe state which is directly relevant. But history may provide evidence to this effect – "the presumption of general or particular acceptance which may be raised by absence of protest. . . (will be) strengthened in proportion to the length of time silence persists"[136]. "The primary function of the theory of historic rights is . . . to make up for the lack of express evidence of the acquiescence of a particular state against whom such a claim is meant to be invoked"[137].

This study accordingly relegates consideration of problems of consolidation of title by prescription. The existence of prescription in international law is controversial[138]. International Tribunals observe persistent silence on this subject[139], and, even when it is admitted, acquiescence is stressed as essential to the validity of the prescriptive title[140]. Emphasis is therefore here placed on the doctrine of acquiescence.

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[134] *Ibid.*, pp.54, 55.

[135] For a statement on the juridical irrelevance of historical, Archaelogical, religious and other allied factors see *I.C.J. Reports*, 1962 (Temple case), at p.15.

[136] McGIBBON, I.C., "Customary and International Laws and Acquiescence". *B.Y.I.L.*, Vol. 33, (1957), p.115, at p.120.

[137] BLUM, Yehuda Z. *Historic Titles in International Law*. The Hague, Martinus Nijhoff, 1965; p.55.

[138] See the Chamizal Arbitration, 1911 (*U.N.R.I.A.A.*, Vol. XI, p.328) between the United States of America and Mexico, where the Tribunal entertained serious doubts as to the applicability of prescription in international law.

[139] See argumentation of Mr. Reuter before the Court in the Temple case where he affirmed that:

> "It is our firm conviction that, in a general way, international case law has not thought it necessary to describe the formal processes which confirm the consolidation effect of the lapse of time. It is certain that arbitrators have hesitated to apply in international law any theory of acquisitive prescription . . . it could be shown without difficulty and without labouring the point that though international case law has always attached much weight to facts showing the effective exercise of sovereignty, it does not readily resort to the vocabulary of prescription".

*I.C.J., Pleadings* (1962), Vol. II, p.207.

[140] See, for example, Louisiana V. Mississippi (202 *U.S. Reports* (1906), p.1) where the Court stated that:

> "The question is one of boundary and this Court has many times held that, as between the states of the Union, long acquiescence in the assertion of a particular boundary and the exercise of dominion and sovereignty over the territory within it should be accepted as conclusive, whatever the international rule might be in respect of the doctrine of the acquisition by prescription of large tracts of country claimed by both". (*Ibid.*, pp.53-54).

See also Indiana V. Kentucky (136 *U.S. Reports* (1890), p.479 at p.510); Arkansas V. Mississippi (250 *U.S. Reports* (1919), at p.45; Michigan V. Wisconsin (270 *U.S. Reports* (1936), p.296, at p.308; Arkansas V. Tennessee (310 *U.S. Reports* (1940), p.563 at p.570);
See also Johnson, "Acquisitive Prescription in International Law", *B.Y.I.L.*, Vol. 28 (1950), p.332,

## B. *ACQUIESCENCE*

> "Like recognition[141], acquiescence produces an estoppel in circumstances when good faith would require that the state concerned should take active steps of some kind in order to preserve its right to freedom of action. It differs from recognition merely in its mode of expression: passive toleration; for even implied recognition presupposes some acts which are capable of being interpreted as such. When, as in the case of the Ihlen declaration, it is accompanied by a positive act, by which acquiescence is expressed, it amounts to recognition"[142].

Both these notions are manifestations of a legally operative consent on the part of a state. Acquiescence, though, is essentially a negative concept. It takes the form of silence or absence of protest in circumstances which generally call for a positive reaction signifying an objection. *Qui tacet consentir videtur si loqoui debuisset ac potuisset*[143]. Knowledge on the part of the acquiescing state is, therefore, a prerequisite to acquiescence[144].

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at p.345: "Display of authority by one Party, acquiescence in that display by the other Party – those are the *sine qua non* of acquisitive prescription" at p.353: "Acquisitive prescription is the means by which, under International Law, legal recognition is given to the right of a state to exercise sovereignty over land or sea territory in cases where that state has, in fact, exercised its authority in a continuous, uninterrupted, and peaceful manner over the area concerned for a sufficient period of time, provided that all other interested and affected states . . . have acquiesced in this exercise of authority. Such acquiescence is implied in cases where the interested and affected states have failed within a reasonable time to . . . manifest their opposition in a sufficiently positive manner".

[141] "By granting recognition (subjects of international law) do not undertake any commitment beyond not to challenge in future whatever they have previously acknowledged. Thus, the legal effect of every act of recognition is to create an estoppel. In the Judgement of the World Court in the Eastern Greenland case (1933) this aspect of the matter is clearly brought out: "Norway re-affirmed that she recognized the whole of Greenland as British; and thereby she has debarred herself from contesting Danish sovereignty over the whole of Greenland"

SCHWARZENBERGER, *op.cit.*, p.253. Although the usefulness of this statement may be contested in some cases (See, JENNINGS, *op.cit.*, p.44) it certainly holds in the present context, because of the rule of general opposability of international boundaries.

[142] SCHWARZENBERGER, *op.cit.*, p.256.

[143] See ANZILOTTI, Dionisio. *Cours de Droit International* (French translation by Gidel). Paris, Sirey, 1929; p.348:

> "La simple manière de se comporter d'un Etat, y compris, dans des circonstances déterminées, même son silence, peut signifier la volonté de reconnaitre comme légitime un état de choses donné".

See also statement of the Swiss Federal Council in the Colombia-Venezuela boundary Arbitration, to the effect that:

> "L'absence de protestation est, en droit international, une des formes de l'acception ou de la reconnaissance de certains faits".

*(U.N.R.I.A.A.*, Vol.I, p.250); and see Temple of Preah Vihear case, *I.C.J., Reports*, 1962, at p.23.

[144] "Acquiescence is often implied, in the interests of international order, in cases where it does not genuinely exist; but without knowledge there can be no acquiescence at all".

JOHNSON, *B.Y.I.L.*, Vol. 27, (1950), p.347.

Since silence might be interpreted as consent, it is important that the devices of protest and reservation of rights be concurred to. This has been stressed in state practice[145], by judicial bodies[146] and by distinguished authors[147], as well as in pleadings before such bodies[148].

Having thus briefly clarified the function of acquiescence, we proceed to examine its role as constitutive of international boundaries in the light of state practice and decisions of Municipal and International Tribunals.

### i) *The Supreme Court of the United States*

Foremost among National Tribunals to endorse the doctrine of acquiescence in the context of boundary disputes is the Supreme Court of the United States.

While some of this Court's early judgements recognized international prescription[149], the general trend has been steadily drifting away from the principle of prescription and shifting the emphasis towards the doctrine of acquiescence.

The issue has been somewhat obscured by the Court's decision in Arkansas

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See also SUY, Eric. *Les actes Juridiques Unilatéraux en Droit International Public.* Paris, Librairie générale de droit et de jurisprudence, (1962); p.62 and authorities therein cited.
And see Proceedings of the Alaskan Boundary Tribunal, Vol. VII, pp.531,533. *Cmd.* 1877 (1904).

[145] See Correspondence in the Alaska dispute between Russia and Great Britain. *Great Britain and the Law of Nations.* Edited by SMITH, Herbert, A. London, P.S. King, 1932-1935; Vol. II, p.5.
In the Sino-Indian Boundary dispute the government of India took the view that in the face of China's failure to lodge any protest against its long-standing assertions, China must be held to have accepted and acquiesced in the Indian alignment (See the summary of the *Report of the Officials*, p.10). This dispute furnishes a salient example of a formal type of protest – since 1954 several protest notes have passed between the two Capitals (See *White Papers*). See also Protest by the West German foreign ministry to the Times Publishing Co. because of a map in Volume III of the Times Atlas of the World which showed the Oder-Neisse Line as the Polish-German international boundary. *The Times*, London, December 8th, 1960.

[146] See Grisbadarna case (1909), SCOTT, *Hague Court Reports*, 1916, p.121; case concerning Sovereignty over Certain Frontier Lands, *I.C.J., Reports*, 1959, p.209; Temple of Preah Vihear case, *ibid.*, p.43.

[147] See, for example, LAUTERPACHT, Hersh. *Private Law Sources and Analogies of International Law.* London, Longmans, Green & Co., 1927, p.280; BOWETT, "Estoppel before International Tribunals and its relation to acquiescence". *B.Y.I.L.*, Vol.33, (1957), p.176; SCHWARZENBERGER, *op.cit.*, p.256.

[148] Thus, in the pleadings in the British Guiana–Venezuela Boundary Arbitration (*Cmd.* 950 (1899), p.315) it was pointed out in the Venezuelan argument that, when confronted with positive assertions of territorial rights on the part of Spain, the governor of Essequibo (in the disputed territory) neither protested to Spain nor suggested to his government that a protest should be made, and Venezuela read into these facts a clear recognition of Spain's rights.
See also *Proceedings of the Alaskan Boundary Tribunal, op.cit.*, Vol. VII, p.910.

[149] See JOHNSON, D.H.N. "Acquisitive Prescription in International Law". *B.Y.I.L.* Vol. 27 (1950), p.342.

v. Tennessee[150], where it referred to these notions as interchangeable.

In this case the Court had to deal with a phenomenon of avulsion of the Mississippi River, the main navigable channel of which was defined as the eastern boundary of the territory of Arkansas in the Treaty of Peace between the United States and Great Britain, in 1783. The Court supported Arkansas' contention that this thalweg was its original boundary, as well as its contention that the avulsion, which occurred in 1821 in the course of the river, did not change the boundary theretofore existing between Tennessee and the territory of Arkansas. The Court stated that the thalweg rule yields to the doctrine that a boundary is unaltered by an avulsion and in such case, in the absence of *prescription*, the boundary no longer follows the thalweg but remains at the original line, although now on dry land because the channel has filled. And, in turn, that this doctrine as to the effect of an avulsion may become inapplicable when it is established that there has been *acquiescence* in a long-continued and uninterrupted assertion of dominion and jurisdiction over a given area.

The Court pronounced that:

> "This principle of prescription and acquiescence. . . (is) essential to the 'stability and order' as between the states of the Union"[151].

Since the Court found that Tennessee had continuously exercised dominion and jurisdiction over the disputed area as of 1826 and up to the time of bringing of the suit, and that Arkansas acquiesced, it decided for the former state.

From the decision taken as a whole, however, it emerges that this case was, in effect, decided on application of the principle of acquiescence, as conceived in earlier decisions rendered by the same Court, some of which were relied upon in this judgement.

In Virginia v. Tennessee[152] the Court interpreted unilateral legislative acts on the part of both states[153] as well as other acts and omissions on their part and on the part of Congress, as recognition and acquiescence on the part of both parties for a long course of years in a boundary alignment which was somewhat different from the line established in the original grants. The Court

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[150] 310 *U.S. Reports* (1940), p.563

[151] *Ibid.*, p.570.

[152] 148 *U.S. Reports* (1893), p.503.

[153] *Ibid.*, pp.512, 514.

stated that:

> "a boundary line between states or provinces, as between private persons, which has been run out, located and marked upon the earth, and afterwards recognized and acquiesced in by the parties for a long course of years, is conclusive, even if it be ascertained that it varies somewhat from the course given in the original grant"[154] .

In Louisiana v. Mississippi[155] the Court declared that:

> "The question is one of boundary, and this Court has many times held that, as between the states of the Union, long acquiescence in the assertion of a particular boundary and the exercise of dominion and sovereignty over the territory within it, should be accepted as conclusive, whatever the international rule might be in respect of large tracts of territory claimed by both"[156].

In New Mexico v. Colorado[157] the Court decided the alignment in dispute of the boundary between the two states upon the statement that:

> "from 1868 when Darling (the surveyor) ran and marked the line of the 37th parallel, to 1919, when this suit was brought, a period of more than half a century, this line was recognized and acquiesced in, successively, as the boundary between the two territories, between the state of Colorado and the territory of New-Mexico, and between the two states"[158].

In Michigan v. Wisconsin[159] the Court was confronted with a controversy over portions of the boundary between the two states.

The Court found that the description of the boundary line in the enabling act under which Michigan was admitted to the Union was inserted under a geographical mistake, which was discovered as early as 1841, of which Michigan, long prior to the admission of Wisconsin, had knowledge; that the line, as claimed by Wisconsin, was surveyed by Government Surveyors in 1841 and 1847; that Michigan not only assented to the result of these surveys, but actually participated in securing the insertion of the description in the Wisconsin Enabling Act, and itself substantially accepted it by her Constitution of 1850; that for a period of more than 60 years she stood by without objection with full knowledge of the

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[154] *Ibid.*, p.522.
[155] 202 *U.S. Reports* (1905), p.1.
[156] *Ibid.*, p.53.
[157] 267 *U.S. Reports* (1924), p.30.
[158] *Ibid.*, p.40.
[159] 270 *U.S. Reports* (1925), p.295.

possession, acts of dominion, and claim of exercise of jurisdiction on the part of Wisconsin over the area in question; that the line as claimed by Wisconsin had been, from the time of the survey of 1847, accepted as the true one by the Federal Government and, in its surveys, maps, sales and other acts continually and consistently recognized, with the knowledge of Michigan and without protest on her part.

Accordingly the Court refuted Michigan's contention that it laboured under an excusable mistake. Upon the confirmation that:

> "The rule, long-settled and never doubted by this Court, that long acquiescence by one state in the possession of territory by another and in the exercise of sovereignty and dominion over it is conclusive of the latter's title and rightful authority"[160]

it found that:

> "The rule is applicable here and is decisive of the question in respect . . . of the boundary of Wisconsin"[161].

As to another section of the boundary, the Court again stated that it "is now fixed and finally acquiesced by long acquiescence"[162].

In Massachussetts v. New York[163] the Court declared that:

> "Long acquiescence in the possession of territory and the exercise of dominion and sovereignty over it may have a controlling effect in the determination of a disputed boundary"[164].

In Vermont v. New Hampshire[165] the Court construed Order in Council of July 20, 1764, which defined that boundary between New York and New Hampshire, as giving reason to Vermont in the boundary dispute opposing it to New Hampshire. The Court found support to its conclusion, *inter alia*, in the fact that:

> "The New Hampshire representatives in Congress were familiar with the terms of (its) resolutions and could not have been unaware of the fact that in all the formal representations made to Congress on behalf of Vermont and in the various reports and resolutions of Committees and the resolutions of Congress itself, the Eastern boundary of Vermont was described interchangeable as the west side of the Connecticut River . . . Although these were public acts of notoriety, New Hampshire does not appear ever to have made any objections to these definitions of the boundary line. The conclusion we have reached . . .

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[160] 270 *U.S. Reports* (1925), p.295.
[161] *Ibid.*, p.308.
[162] *Ibid.*, p.314.
[163] 271 *U.S. Reports* (1925), p.65.
[164] *Ibid.*, p.95.
[165] 289 *U.S. Reports* (1932), p.593.

finds support . . in the long continued failure of New Hampshire to assert any dominion over the west bank of the river and in her long acquiescence in the dominion asserted there by Vermont"[166].

In New Jersey v. Delaware[167] the Court rejected the claim put forward by New Jersey on the ground, *inter alia*, of lack of acquiescence, having found that:

"The truth indeed is that almost from the beginning of statehood Delaware and New Jersey have been engaged in a dispute as to the boundary between them. There is no room in such circumstances for the application of the principle that long acquiescence may establish a boundary, otherwise uncertain . . . Acquiescence is not compatible with a century of Conflict"[168].

ii) *International Tribunals*

The submission invoked above as to the primary importance of assent in the context of delimitation is strengthened upon consideration of decisions of International Tribunals, which frequently adopted the doctrine of acquiescence in boundary adjudications; for this doctrine, altogether dispensing with the requirements for efflux of a fixed time period[169], obviously stresses the psychological element of assent as the ultimate *raison d'être* of title.

Thus, the doctrine of prescription has been invoked by the United States in the Chamizal case[170]. But the Tribunal "without thinking it necessary to discuss the very controversial question as to whether the right of prescription invoked by the United States is an accepted principle of the law of nations, in the absence of any convention establishing a term of prescription"[171] dismissed it upon the evidence adduced[172]. Again in 1897, Great Britain and the United States signed a treaty with a view to having the British Guiana–Venezuela boundary dispute settled by arbitration. Article IV (a) of this treaty stipulated that:

"Adverse holding or prescription during a period of fifty years shall make a good title. The Arbitrators may deem exclusive political control of a

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[166] *Ibid.*, p.613.

[167] 291 *U.S. Reports* (1933), p.361.

[168] *Ibid.*, p.376.

[169] "The great cardinal characteristic of acquiescence. . . (is) that it does not require any particular length of time to perfect it; it depends in each particular case upon all the circumstances of the case".
*Proceedings of the Alaskan Boundary Tribunal, op.cit.*, Vol. VII, p.619.

[170] *U.N.R.I.A.A.*, Vol. XI, p.309.

[171] *Ibid.*, p.328.

[172] *Ibid.*, pp.328/9.

district, as well as actual settlement thereof, sufficient to constitute adverse holding or to make title by prescription"[173].

But the Tribunal, on October 4th, 1899, handed down an exceedingly short decision, in which it gave no reasons whatsoever for the award, and merely described the boundary line it approved, so that: "unfortunately the actual award in this arbitration . . . added little to the law of prescription"[174].

The principle of acquiescence has, on the other hand, many times been invoked and admitted by International Tribunals in the context of boundary disputes, sometimes expressly mentioned and others otherwise recognized.

While in some international arbitration cases relative to boundary disputes acquiescence has been invoked in connection, rather, of questions of territorial status[175], this notion was dealt with in other cases in the context of the boundary question proper.

Thus, in the Guatemala–Honduras boundary Arbitration, 1933[176], the Tribunal(in its search for evidence on the *uti possidetis* line of 1821, which by Article V of the Treaty of Arbitration of July 16th, 1930, was deemed "the only juridical line which can be established" between the two states[177]) considered itself:

> "at liberty to resort to . . . conduct indicating royal acquiescence in colonial assertions of administrative authority. The (Spanish) Crown was at all times at liberty to change its royal commands or to interpret them by allowing what it did not forbid. In this situation the continued and unopposed assertion of administrative authority by either of the Colonial entities, under claim of right, which is not shown to be an act of usurpation because of conflict with a clear and definite expression of the Royal will, is entitled to weight and is not to be overborne by reference to antecedent provisions or recitals of an equivocal character"[178].

For the same purpose the Tribunal deemed the conduct of the new states:

> "in establishing their independent governments and in formally describing the extent of the territory to the sovereignty of which they regarded them-

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[173] HERTSLET's *Treaties*, Vol. 2, p.943.

[174] JOHNSON, D.H.N. "Acquisitive Prescription in International Law". *B.Y.I.L.*, Vol.28 (1950), p.332 at p.340.

[175] See the Alaskan Boundary dispute, 1903 (*Cmd.*, 1877 (1904) p.49 at p.79/87); The Anglo-Brazilian boundary dispute, 1904 (*U.N.R.I.A.A.*, Vol. XI, p.21 at p.22); The Colombia–Venezuela boundary Arbitration, 1933 (*U.N.R.I.A.A.*, Vol. I, p.223 at pp.254, 280).

[176] *U.N.R.I.A.A.*, Vol. II, p.1307.

[177] *Ibid.*, p.1322.

[178] *Ibid.*, pp.1324/25.

selves as succeeding is significant . . . The Constitutions of the new states and the Governmental acts of each especially when unopposed, or when initial opposition was not continued, are of special importance"[179] .

Accordingly, the Tribunal construed the publication by Guatemala, in 1822, of a map, and a grant this state made, twelve years later, of unappropriated land, on which grant part of the disputed boundary was designed, as follows:

"This deliberate and formal description by Guatemala of the boundary . . . thus clearly indicated the acquiescence of Guatemala . . . nothing has been shown to alter the conclusion which was thus reached one hundred years ago"[180].

Formerly, in the Chamizal case[181] , The Commissioners rejected the American contention that Mexico is estopped from asserting title by reason of undisturbed, uninterrupted, and unchallenged possession of the disputed territory by the United States, on the ground that "the physical possession taken by the citizens of the United States and the political control exercised by the local and Federal Governments, have been constantly challenged and questioned by the Republic of Mexico, through its accredited diplomatic agents". Therefore, "the Mexican Government had done all that could be reasonably required of it by way of protest"[182] .

In the Grisbadarna Arbitration[183] the Tribunal decided the boundary line between Norway and Sweden, *inter alia,* upon examination of the situation of fact which it found to have existed for a long time, especially the use made of the Grisbadarna fishing banks by the fishermen of both states and the acts of possession and ownership exercised by the two governments. From the Tribunal's award it emerges, however, that Norway's acquiescence in certain acts of authority performed by Sweden was reckoned with as one of the decisive factors in deciding a line assigning Grisbadarna to Sweden.

Thus the Tribunal observed that:

"the stationing of lightboat, which is necessary to the navigation in the regions of Grisbadarna, was done by Sweden without meeting any protest and even at the initiative of Norway, and likewise a large number of beacons were established there without giving rise to any protest"[184].

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[179] *Ibid.*, p.1325.
[180] *Ibid.*, p.1360.
[181] *U.N.R.I.A.A.*, Vol.XI, p.309.
[182] *Ibid.*, pp.328. 329.
[183] SCOTT, *Hague Court Reports,* 1st Series, 1916, p.121.
[184] *Ibid.*, p.131.

The practice of International Arbitration Tribunals, thus confirming the bearing of the doctrine of acquiescence on questions of boundary, is constantly continued by the International Court of Justice. Significantly so in boundary adjudications; whereas the doctrine of acquiescence was invoked by the Court in some decisions relating to other issues, the notion was principally developed in boundary cases.

iii) *The International Court of Justice*

Foremost among international adjudications to elaborate on the role of conterminous states' conduct in the context of boundary making is the decision of the International Court of Justice in the Temple of Preah Vihear case[185], wherein recognition, acquiescence and "estoppel" all played a prominent role.

At the basis of this dispute between Cambodia and Thailand regarding sovereignty over a small area of frontier territory containing the ruins of the ancient sanctuary called the Preah Vihear Temple, lay the different description of the international boundary between the two states in a treaty of 1904 between Siam and France (Cambodia having been at that time French Indo-China), and in a map of 1907, produced by the French authorities at the request of the Siamese. Article I of the treaty defined the boundary in the relative sector as the watershed line. But the map was not consonant with the watershed principle laid down for the Commission of delimitation in the treaty. Consequently, the map alignment diverged from that of the treaty, the divergence being explained by a serious, but *bona fide*, mistake made in 1907 due to the incorrect location of a river (O'Tasem) on a survey map and the effect of that error in relation to the boundary line near the Temple.

This map, which later became known in the case as the Annex I map, was the main prop of the Cambodian contention, whereas Thailand argued that it was a unilateral production and had no binding character on the parties. To this contention all members of the Court agreed, as Sir Gerald Fitzmaurice, in his separate opinion, stated:

> "however respectable the provenance of the map was, it must be held to have been a purely unilateral production, not in any way binding on Thailand at the moment of its communication to her, and subject entirely at that time, to her acceptance or rejection, either in whole or in part"[186].

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[185] *I.C.J. Reports*, 1962.

[186] *Ibid.*, p.55.

Actually, for more than twenty-five years nobody seems to have realized that there was a divergence between the map line and the true watershed line. The discovery of this divergence was only made in 1934/5. Even after this date, however, the Siamese government did not lodge any protest.

The Court did not make the difference between the pre- and post-discovery period. It seized the point that the map, mistaken or not, was accepted by the Thailand government without protest or even comment from the moment of its inception:

> "The real question, which is the essential one in this case, is whether the parties did adopt the Annex I map, and the line indicated on it, as representing the outcome of the work of delimitation of the frontiers in the region of Preah Vihear, thereby confining on it a binding character"[187].

The Annex I map, a unilateral production at the moment of its inception, could become, thus, subsequently and due to conduct of the litigant states, part of the treaty settlement, and acquire a conventional character. Not by itself, but as an integral part of a complex procedure:

> "The Court considers that the acceptance of the Annex I map by the parties caused the map to enter the treaty settlement and to become an integral part of it . . . the parties . . . adopted an interpretation of the treaty settlement which caused the line, in so far as it may have departed from the line of the watershed, to prevail over the relevant clause of the Treaty"[188].

The opinion of Sir Gerald Fitzmaurice as to this point presents, alternatively, a variation:

> "The crucial issue in this case is . . . whether Thailand, by her conduct in 1908, and thereafter, in fact accepted the Annex I map line as representing the outcome of the work of delimitation provided for by the treaty of 1904, knowing how it had been produced" (this is the Court's majority construction); "or more simply, whether Thailand just accepted the line as being the frontier line, accepting also the risk of possible inaccuracy"[189].

(here the map question is separated from that of the treaty, and the rule *lex posterior derogat priori* applied preferring the map to the treaty

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[187] *Ibid.*, p.22.
[188] *Ibid.*, p.33.
[189] *Ibid.*, p.55.

alignment).

In the oral pleadings M. Reuter, for Cambodia, presented an original construction of the map's standing.

Relying on the decision of the Permanent Court of International Justice in the Free Zones affair[190] he contended that:

> "Si, par hypothèse, nous acceptons de nous placer dans le cadre des objections Thailandaises, la carte de l'annexe I exprime une délimitation unilatérale . . . effectuée par un Etat qui nourrit l'illusion . . de bonne foi . . . d'avoir opéré une délimitation conventionelle . . . une telle situation est précaire . . . le caractère unilatérale ne peut pas subsister, très vite . . . la délimitation devienne conventionelle . . . une délimitation peut bien être unilatérale dans son origine, mais elle est nécessairement réciproque dans ses effects"[191].

The Court's judgement does not seem to maintain this idea of a unilateral delimitation constituting an inchoate title, at least not expressly so. It is based, rather, on a perusal of Thailand's conduct, from which the Court inferred:

i) Thailand's acceptance of the Annex I map as from 1908–1909[192].
ii) Thailand's subsequent behaviour precludes her from still being entitled to invoke the alleged incorrectness of the map against

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[190] In this case (*P.C.I.J., Series – A/B*, No. 46, at p.145) the Court had to decide the effect of an act of the king of Sardinia who unilaterally decided to define a free zone, and to trace a second, economic, boundary behind the political boundary.

The French government, successor of Sardinia, in its litigation with Switzerland, contested the conventional character (according to the Swiss contention), of the situation thus created.

The Court rejected the French contention, and affirmed the conventional character of the situation thus created. It ruled that:

> "Ce manifeste d'ailleurs, notifié en exécution des ordres souverains, à la suite de l'adhésion donnée par sa Majesté le roi de Sardaigne aux réclamations du Canton de Valais fondées sur l'article 3 dudit traité de Turin, mit fin à un différend international et fixa obligatoirement pour le Royaume de Sardiagne ce qui a l'avenir devait faire droit entre les parties.
>
> L'accord de volonté ainsi traduit par le manifeste confère à la délimitation de la zone de St. Gingolph un caractère conventionnelle que doit respecter la France comme ayant succédé à la Sardaigne dans la souveraineté sur ledit territoire".

[191] *I.C.J., Pleadings* (1962), Vol. II, pp.523-7, at p.523.

[192] On this question of acceptance the Court was divided.

In the opinion of the majority, the conduct of the Siamese government amounted, in the following respects, to an acknowledgement by conduct:

a) The maps were given publicity, communicated to all members of the mixed commission, circulated to Siamese legations and to foreign countries.
b) No Siamese member of the Commission made any reservation as to the boundary line in the relevant sector.
c) Prince Damrong, Siamese minister of the interior, thanked the French minister in Bangkok for copies, asked for more and distributed these to provincial governors. No complaint resulted.

Cambodia[193].

As to the doctrine of acquiescence, our present direct occupation – the Court, upon examination of the facts, rejected the contention of Thailand that a course of conduct, involving at most a failure to object, cannot suffice to render her a consenting party to a departure at Preah Vihear from the watershed line specified by Article I of the 1904 Treaty. It stated that:

> "it is clear that the circumstances were such as called for some reaction, within a reasonable period, on the part of the Siamese authorities, if they wished to disagree with the map or had serious doubts to raise in regard to it. They did not do so, either then or for many years, and thereby must be held to have acquiesced"[194].

Sir Gerald Fitzmaurice, in his separate opinion, expressed the same opinion:

> "I can place no other interpretation on Thailand's conduct, considered as a whole, than that she accepted this particular line as representing the frontier in this region. Moreover, even negative conduct – that is to say failure to act, react or speak, in circumstances where failure to do so must imply acceptance is, in my opinion, sufficient for this purpose, if the facts are clear"[195].

Whereas in their dissenting opinions Judges Moreno Quintana and Wellington Koo seemed to have had the same conception of the doctrine of acquiescence as expressed by the Court, although they thought it not applicable in this specific case[196], Sir Percy Spender, in his weighty dissention, seems to have conceived of the said doctrine differently.

First, he conceived of it (or, rather, of its accepted probative elements) as a relative notion.

> "In determining what inferences may or should be drawn from Thailand's silence and absence of protest regard must, I believe, be had to the period of time when the events we are concerned with took place, to the region of the world to which they related, to the general political conditions existing in Asia at this period, to political and other activities of western countries in Asia at the time and the fact that of the two states concerned

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d) A Franco-Siamese Commission of Transcription set up in 1909 to regularize maps made no reference to an error over Preah Vihear in the Annex I map on which its deliberations were based.

[193] This issue is examined herein under the "Estoppel" heading.

[194] *Ibid.*, p.22.

[195] *Ibid.*, p.55.

[196] *Ibid.*, p.70, 96.

one was Asian, the other European. It would not, I think, be just to apply to the conduct of Siam in this period objective standards comparable to those which reasonably might today be or might then have been applied to highly developed European states"[197].

Secondly – Sir Percy Spender rejected the Court's conception of acquiescence and its relation to "estoppel", or "preclusion"[198]. Upon this he stated that:

"The crucial question which, in my opinion, calls for an answer is not whether Siam recognized, acknowledged, adopted or acquiesced in Annex I . . . but whether the conduct of France and Siam ever gave rise to an implied Conventional arrangement between the two states under which they mutually agreed to be bound by the frontier line shown on Annex I; whether it was or was not in conformity with the watershed criterion stipulated in the treaty of 1904. This question, in my opinion, the Court leaves unanswered"[199].

According to Judge Spender:

"The evidence in this case falls short of such a test; the history of the preparation and delivery of the map shows clearly no intention on the part of either France or Thailand to enter into an international agreement to substitute one line for another"[200].

Obviously, the learned Judge rejected the Court's conception of the treaty and the map being part of one conventional arrangement.

On the whole, the Court's judgement stresses the importance of assent and conduct of limitrophe states in boundary questions. It is significant that the effective exercise of state functions does not play in this case the prominent role appertaining to it in real territorial adjudications.

In fact, as regards its failure even to raise the question of the map as such until 1958, Thailand stated that she was, at all material times, in possession of Preah Vihear; that she therefore had no need to raise the matter, and that no adverse conclusions should be drawn from her failure to repudiate the map. Thailand's acts on the ground were thus put forward as evidence of conduct as sovereign, sufficient to negate any suggestion that she accepted or acquiesced in a delimitation having the effect of attributing the sovereignty over Preah Vihear to Cambodia.

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[197] *Ibid.*, p.128.
[198] *Ibid.*, pp.131 – 133.
[199] *Ibid.*, p.130.
[200] *Ibid.*, p.140.

The Court rejected this contention, emphasizing the priority of a conventional production over physical acts:

> "with one or two important exceptions . . . the acts concerned were exclusively the acts of local, provincial, authorities . . . the Court finds it difficult to regard such local acts as overriding and negating the consistent and undeviating attitude of the central Siamese authorities to the frontier line as mapped?"[201].

On this, and on other points, this judgement largely confirms the jurisprudence of the Frontier Lands case, 1959[202].

In this case, the International Court of Justice was confronted with the problem of the effect of certain current acts of administration accomplished by Dutch local functionaries on the sovereignty attributed, according to the Court's judgement, to Belgium by the 1843 boundary conference. The Court estimated these acts insufficient to displace the sovereignty established by this convention.

While the question "whether Belgium has lost its sovereignty, by non-assertion of its rights and by acquiescence in acts of sovereignty alleged to have been exercised by the Netherlands"[203] was answered by the Court in the negative, the dissenting judges arrived at different conclusions.

Thus, Sir Hersch Lauterpacht emphasized that:

> "at least during the fifty years following the adoption of the convention there had been no challenge to the exercise, by the Government of the Netherlands and its officials, of normal administrative authority with regard to that plot"[204]

Judge Armand-Urgon stated that:

> "the Netherlands Government has exercised preponderant governmental functions in respect of the disputed plots, without these having given rise on the part of the Belgian Government to any protest or any opposition. This prolonged tolerance of the Belgian Government in this respect has created an undisputable right of sovereignty in favour of the Netherlands Government"[205].

Judge Moreno Quintana stressed that:

> "Belgium, which was not separated from Holland until 1831, has since that date, and up to 1921 perhaps – almost a century – made no formal protest against

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[201] *Ibid.*, p.29.
[202] *I.C.J. Reports*, 1959, p.209.
[203] *Ibid.*, p.227.
[204] *Ibid.*, p.231.
[205] *Ibid.*, p.250.

the exercise of sovereignty by the other country"[206].

On the whole, this judgement affirms the idea, reaffirmed by the Court in the Temple case, that the notoriety of documents relative to a boundary must exclude posterior contestations based on a new critical perusal of such documents.

iv) *State Practice*

The practice of states demonstrates that that of judicial bodies is sound. The attitude of state authorities supports the assertion as to the primordial importance of limitrophe states' assent, whether expressed by recognition or acquiescence. Such practice is usually resorted to in the context of boundary disputes, wherein emphasis is placed on failure to protest, upon the conviction that:

> "l'absence de protestation est en droit international une des formes de l'acceptation de la reconnaissance de certains faits"[207].

Such pleadings had a prominent part before the Alaskan Boundary Tribunal[208], and before the Swiss Federal Council in course of the Colombia-Venezuela boundary Arbitration[209]. The same importance was accorded by the government of India to lack of protest on the part of China[210]. The Indian Government asserted that, in view of China's failure to protest, it must be held to have accepted and acquiesced in the Indian alignment[211].

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[206] *Ibid.*, p.255.

[207] Colombian argument in the Colombia-Venezuela boundary Arbitration (*U.N.R.I.A.A.*, Vol. I, p.223, at p.251).

[208] See *Proceedings, op.cit.*, Vol. VII, p.910.

[209] *Loc. cit.*

[210] See letter from the Prime Minister of India to the Prime Minister of China, 26 September, 1959, wherein the former emphasized that:

> "Until now the Chinese government have not protested against the exercise of jurisdiction by the Government of India up to the customary border. You have yourself acknowledged the fact that no armed clash ever occurred along our border until the beginning of this year. All Chinese Governments have respected the Indian border ... Not even a protest was registered in accordance with established state practice in this region"

(*White Paper No. II*, p.35); See also, to the same effect, *White Paper III*, pp.85, 95, 96.

[211] See *Report of the Officials*, Concluding Chapter, pp.39-44.

## C. *"ESTOPPEL"*

As Lauterpacht rightly remarks, the doctrine of estoppel is exclusively confined to English law, but in substance the principle underlying it is recognized by all systems of private law. Where the Anglo-American lawyer refers to estoppel, the continental jurist will usually say that the party is 'precluded' from asserting a fact or putting forward a demand[212]. In the sphere of international law this rule, even if we regard it, *arguendo*, as solidly established[213], is not understood in quite the same sense as in municipal law. Especially, it should not be confounded with the Anglo-Saxon technical rule. With this qualification in mind, the present study uses the term "estoppel".

The separate examination of "estoppel" herein does not mean that the present author considers this as a truly independent device for determination of title. Indeed, the notion was developed in international adjudication in close relation to institutions based on tacit accord and, in fact, the present study tends to confirm that in judicial practice it was never applied as a substantive rule, whatever the theory may be. As the principle that condemns contradiction between previous acts and subsequent claims was mainly elaborated in boundary cases, however, and is generally considered applicable in jurisprudence, a structural separation was made herein between this and the two other notions composing the title of this section in the work.

### i) *"Estoppel" as a Consequence of Juridically Operative Consent*

Treating with the doctrines of Recognition and Acquiescence we stressed the opposability effect. The function of this notion is closely related to that of "estoppel".

Thus, Schwarzenberger conceives of recognition and acquiescence as prerequisite for a situation to become opposable. The legal effect of both is to create an "estoppel":

> "However weak a title may be, and irrespective of any criterion, recognition estops the state which has recognized the title from contesting its validity at any future time"[214];

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[212] LAUTERPACHT, Hersch. *Private Law Sources and Analogies of International Law.* London, Longmans, Green & Co. Ltd., 1927; p.204.

[213] On this question see *Z.f.O.V.R.*, Vol. 5 (1935), pp.517-545; BOWETT, D.W. "Estoppel before International Tribunals and its relation to Acquiescence". *B.Y.I.L.*, Vol. 33 (1957), p.176.

[214] SCHWARZENBERGER, Georg. "Title to Territory; Response to a Challenge". *A.J.I.L.*, Vol. 51 (1957), p.308, at p.316.

"Like recognition, acquiescence produces an estoppel in circumstances when good faith would require that the state concerned should take active steps of some kind in order to preserve its rights of freedom of action"[215].

That "estoppel" operates irrespective of title's weakness or existence is not contested. But some authorities in international law have different opinions as to the interaction of the present concepts.

Thus, whereas Sir Gerald Fitzmaurice, in the Temple case, stated that:

> "The principle of preclusion . . . is quite distinct theoretically from the notion of acquiescence. But acquiescence can operate as a preclusion or estoppel in certain cases, for instance where silence, on an occasion where there was a duty or need to speak or act, implies agreement, or a waiver of rights, and can be regarded as a representation to that effect"[216].

Sir Percy Spender, in his dissenting opinion, conceived of the operation of these doctrines in a totally different way:

> "A state may of course recognize – or acquiesce in – any fact or situation either of law or fact and its intention to do so may be evidenced expressly or by implication. The recognition may become the source of a legal right or obligation to the extent to which it provides an essential element in the establishment of a legal right or obligation, as for example in preclusion or prescription. It may provide evidence of a fact or a state of facts, the probative value of which depends upon all the surrounding circumstances. It may afford aid in the interpretation of a document or conduct.
>
> The act of recognition is not, however, a unilateral juridical act which of its own force precludes a state from thereafter challenging the fact or situation recognized. It may, depending upon the circumstances, provide strong, perhaps overwhelming, evidence of the truth of the fact or situation recognized; it may provide only evidence which is destroyed or modified by other evidence. Preclusion – or, to use its Anglo-Saxon equivalent, estoppel – may however only occur where all the elements which constitute the principle of preclusion can be shown to exist"[217].

With respect, this opinion cannot be upheld. That recognition and acquiescence operate as explained by Schwarzenberger is demonstrated in the same Temple case decision, as well, for example, as in the judgement of the World court in the Eastern Greenland case, where it stated that:

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[215] SCHWARZENBERGER, *R.d.C.* Vol. 87 (1955), p.151 at p.256.

[216] *Op.cit.*, p.62.

[217] *Ibid.*, pp.130/1.

"Norway re-affirmed that she recognized the whole of Greenland as Danish; and thereby she has debarred herself from contesting Danish sovereignty over the whole of Greenland"[218].

In an essay on "Estoppel before International Courts and its relation to acquiescence"[219], D.W. Bowett expresses the belief that the similarity of effect between "estoppel" and acquiescence tends to confuse the notion of acquiescence with the doctrine of "estoppel" in circumstances in which "estoppel" affects only the position between the parties, without regard to the question whether the claim is recognized or acquiesced in by the community generally.

This observation is rather insignificant in the context of boundary disputes, involving two states only, where an "estoppel" to which one of them is party may be decisive, as amply demonstrated in some international boundary litigations, where the principle of "estoppel" (or "preclusion") was principally elaborated.

ii) *"Estoppel" as an Independent Device for Determination of Title*

In the Costa Rica–Nicaragua Boundary Case[220], Nicaragua argued that a treaty of 1858 which defined the boundary was not binding because a third state, San Salvador, had not ratified it in its capacity as guarantor.

The Arbitrator, rejecting this contention, stated that:

"These views are strengthened by a consideration of the evidence adduced on the part of Costa Rica to prove acquiescence by Nicaragua for ten or twelve years in the validity of the treaty . . . the Government of Nicaragua was silent when it ought to have spoken, and so waived the objection now made. It saw fit to proceed to the exchange of ratifications without waiting for San Salvador . . . neither may now be heard to allege, as reasons for rescinding this treaty, any facts which existed and were known at the time of its consummation"[221].

An "estoppel" of this kind may, then, proceed from acquiescence. But the similarity of effects of all three notions composing the title of this section of the present study, due to the rule of general opposability of the international boundary, should not confuse as to their application. As Sir Gerald Fitzmaurice warned in the Temple case:

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[218] *P.C.I.J. Series A/B*, No. 53, at pp.68/9.

[219] *B.Y.I.L.* Vol. 33 (1957), p.176.

[220] MOORE's *International Arbitrations*, Vol. 2, p.1945.

[221] *Ibid.*, pp. 1959, 1961.

"However, in those cases where it can be shown that a party has, by conduct or otherwise, undertaken, or become bound by, an obligation, it is strictly not necessary or appropriate to invoke any rule of preclusion or estoppel, although the language of that rule is, in practice, often employed to describe the situation. Thus it may be said that A, having accepted a certain obligation, or having become bound by a certain instrument, cannot be now heard to deny the fact, to 'blow hot and cold'. True enough, A cannot be heard to deny it; but what this really means is simply that A is bound, and, being bound, cannot escape from the obligation merely by denying its existence. In other words, if the denial can be shown to be false, there is no room or need for any plea of preclusion or estoppel. Such a plea is essentially a means of excluding a denial that might be correct – irrespective of its correctness. It prevents the assertion of what might in fact be true. Its use must in consequence be subject to certain limitations. The real field of operation, therefore, of the rule of preclusion or estoppel, *stricto sensu*, in the present context, is where it is possible that the party concerned did not give the undertaking or accept the obligation in question (or there is room for doubt whether it did), but where that party's conduct has been such, and has had such consequences, that it cannot be allowed to deny the existence of an undertaking, or that it is bound"[222].

One juridically important difference is that "estoppel", unlike the other two notions, is peremptory, and has no probative value in a plea between third parties. Again, this is rather insignificant in the context of boundary questions, because of the rule of general opposability of the international boundary.

The problem, rather, is whether "estoppel" can be accepted as a device for determination of title, and this problem largely relates to the nature of "estoppel" as a procedural or a substantive rule of law.

In his separate opinion in the Temple case, Judge Sir Gerald Fitzmaurice stated that:

"the principle of preclusion ... is certainly applied as a rule of substance and not merely as one of evidence or procedure"[223].

Vice president Alfaro, in his separate opinion in the same case, emphasized that:

"The principle that condemns contradiction between previous acts and subsequent claims is not to be regarded as a mere rule of evidence ... the principle is substantive in character ... it constitutes a presumption *juris et de jure* in virtue of which a state is held to have abandoned its rights, if it ever had it, or else that a state never felt that it had a clear legal title on which it could base

[222] *I.C.J. Reports*, p.63.
[223] *Ibid.*, p.62.

opposition to the right asserted or claimed by another state. In short, the legal effects of the principle are so fundamental that they decide by themselves alone the matter in dispute and its infraction cannot be looked upon as a mere incedent of the procedure"[224].

According to this view "estoppel", where it operates, can shift title. This possibility induced Sir Percy Spender, in his dissenting opinion in the same case, to issue the following warning:

"With profound respect to the Court, I am obliged to say that in my judgement as a result of misapplication of these concepts and an inadmissible extension of them, territory, the sovereignty of which, both by treaty and by the decision of the body appointed under treaty to determine the frontier line, is Thailand's, now becomes vested in Cambodia"[225].

In a recent boundary arbitration[226] the Tribunal adopted vice-president Alfaro's observations on the "estoppel" rule:

"It seems clear from the decision of the International Court of Jusice in the case concerning the Temple of Preah Vihear (Cambodia v. Thailand) merits, . . . and especially from the learned separate opinion of vice-president Alfaro in that case, that there is in international law a principle, which is moreover a principle of substative law, and not just a technical rule of evidence, according to which 'a state party to an international litigation is bound by its previous act or attitude when they are in contradiction with its claims in the litigation' . . . This principle is designated by a number of different terms, of which 'estoppel' and 'preclusion' are the most common. But it is also clear that these terms are not be understood in quite the same sense as they are in municipal law. With that qualification in mind, this Court will employ the term "estoppel" . . ."

. . . Again to quote from the same opinion of the vice-president Alfaro:

"whatever term of terms be employed to designate this principle such as it has been applied in the international sphere, its substance is always the same: inconsistency between claims or allegations put forward by a state, and its previous conduct in connection therewith, is not admissible (allegans contratia non audientus est). That this principle can operate with decisive effect in international litigation, and especially in a boundary dispute, is clear from the Temple case itself"[227].

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[224] *Ibid.*, p.62.

[225] *Ibid.*, p.146.

[226] *Award of Her Majesty Queen Elizabeth for the attribution of a controversy between Argentina and Chile concerning certain points of the boundary between their territories.* London, Her Majesty's Stationery Office, 1966; Vol. I.

[227] *Ibid.*, p.42.

The Tribunal thus clarifies the function of the "estoppel" principle in international law. It is a substantive rule, loosed from the many technical shackles that severely limit its operation in the common law. As explained by vice-president Alfaro:

> "When compared with definition and comments contained in Anglo-American legal texts we cannot fail to recognize that . . . there is a very substantial difference between the . . . clear cut rule adopted and applied in the international field and the complicated classifications, modalities, species, sub-species and procedural features of the municipal system. It thus results that in some international cases the decision may have nothing in common with the Anglo-Saxon estoppel, while at the same time notions may be found in the latter that are manifestly extraneous to international practice and Jurisprudence"[228].

The basis of the rule is the general principle of good faith. As Judge Alfaro further states:

> "the primary function of this principle is good faith that must prevail in international relations, inasmuch as consistency of conduct or opinion on the part of a state to the prejudice of another is incompatible with good faith"[229].

As such, the principle finds place in many legal systems, for:

> "It is reasonable to expect that any legal system should possess a rule designed to prevent a person who makes or concurs in a statement upon which another person in privity with him relies to the extent of changing his position, from later asserting a different state of affairs"[230].

Vice-President Alfaro was, therefore, expressing a widespread opinion in concluding that:

> "this principle, known to the world since the days of the Romans, is one of the 'general principles of Law recognized by civilized nations' applicable and in fact frequently applied by the International Court of Justice in conformity with Article 38, para. I (c), of its statute"[231].

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[228] *I.C.J. Reports*, 1962, pp.39/40.

[229] *Ibid.*, p.42.

[230] McNAIR, Arnold. *The Law of Treaties*. Oxford, the Clarendon Press, 1961; p.485.

[231] Temple Case, *op.cit.*, p.43.

iii) *The Principle of "Estoppel" as applied in Judicial Practice*

Because of the rule of general opposability of the international boundary, "estoppel" operates decisively especially in boundary disputes, and the doctrine has mostly been resorted to in boundary litigations.

The first judicial decision to remove any doubt which may have persisted as to the applicability of the rule in the sphere of international law was the judgement rendered by the International Court of Justice in the case concerning the Arbitral Award made by the King of Spain on 23 December, 1906[232].

In this case the Court was confronted with a dispute between Nicaragua and Honduras with regard to an Arbitral award made in 1906 by the King of Spain, fixing the international boundary between these states. The Arbitral Award was never put into effect. In a note, dated 19 March, 1912, the Foreign Minister of Nicaragua challenged its validity and binding character. This gave rise to the dispute between the parties.

Before the Court Nicaragua contended that the Award does not possess the character of a binding arbitral award and that the so-called 'arbitral' decision is in any way incapable of execution by reason of its omissions, contradictions, and obscurities. Honduras asked the Court to declare that Nicaragua is under an obligation to give effect to the Award.

The first contention of Nicaragua, that the Arbitral Tribunal of 1906 (i.e., the King of Spain) was improperly constituted, was dismissed by the Court on the ground that:

> "No question was at any time raised in the arbitral proceedings before the King with regard either to the validity of his designation as arbitrator or his jurisdiction as such. Before him, the parties followed the procedure that had been agreed upon for submitting their respective cases. Indeed, the very first occasion when the validity of the designation of the King of Spain as arbitrator was challenged in the note of the Foreign Minister of Nicaragua of 19 March, 1912. In these circumstances the Court is unable to hold that the designation of the King of Spain as arbitrator to decide the dispute between the parties was invalid"[233].

Further, the Court declared that:

> "Having regard to the fact that the designation of the King of Spain as Arbitrator was freely agreed to by Nicaragua, that no objection was

[232] *I.C.J. Reports*, 1960, p.192.

[233] *Ibid.*, p.207.

taken by Nicaragua to the jursidiction of the King of Spain as Arbitrator either on the ground of irregularity in his designation as Arbitrator or on the ground that the (Arbitration) Treaty had lapsed even before the King of Spain had signified his acceptance of the office of arbitrator, and that Nicaragua fully participated in the Arbitral proceedings before the King, it is no longer open to Nicaragua to rely on either of these contentions for furnishing a ground for the nullity of the Award"[234].

The other contentions of Nicaragua relating to the validity of the Award were dismissed by the Court upon examination of a number of facts. These included:

i. A telegram, dispatched by the President of Nicaragua to the President of Honduras on the day following the handing down of the Award, in which he stated:

> "I have taken cognizance of the Arbitral Award made by the King of Spain in the matter of the delimitation of the frontier. Having regard to this decision, it appears that you have won the day, upon which I congratulate you. A strip of land more or less is of no importance when it is a question of good relations between two sister nations. The irksome question of the delimitation of the frontier has been resolved in such a satisfactory manner thanks to friendly Arbitration. I hope that in the future no obstacle will disturb the good relations between our respective countries";

ii. A note, dated January 9, 1907, addressed to the Spanish *Chargé d'Affaires* in Central America, in which the Foreign Minister of Nicaragua expressed his government's appreciation "for the graciousness of the King of Spain who, by his Arbitral Award, has terminated our frontier dispute with the neighbouring State of Honduras";

iii. Publication of the Award in the Official Gazette of Nicaragua on January 28, 1907;

iv. Various statements of members of the Nicaragua government before the National Legislative Assembly of that country indicating that the boundary dispute with Honduras had been either 'terminted' or 'settled'.

The Court, therefore, ruled that:

> "Nicaragua, by express declaration and by conduct, recognized the Award as valid and it is no longer open to Nicaragua to go back upon that recognition and to challenge the validity of the Award. Nicaragua's failure to raise any

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[234] *Ibid.*, p.209.

question with regard to the validity of the Award for several years after the full terms of the Award had become known to it, further confirms the conclusion at which the Court has arrived"[235].

Further, the Court stated that:

"repeated acts of recognition by Nicaragua . . . debars it from relying subsequently on complaints of nullity"[236].

Whereas the Court demonstrated, summarily, that its judgement is also valid on grounds other than "preclusion", Judge Sir Percy Spender in his separate opinion, rested his dismissal of the Nicaraguan arguments solely on the ground of "preclusion", thus stressing the effectiveness of this principle in boundary disputes:

"Nicaragua, by reasons of its conduct subsequent to the Award being made, is precluded from relying upon any one of these contentions to invalidate the Award. I place particular importance upon the fact that Nicaragua, for many years after the terms of the Award became known to it, failed to raise any question whatever as to its validity.

I rest my opinion on this aspect of the case exclusively on the ground of preclusion. It is unnecessary to determine whether but for this preclusion any of these contentions of Nicaragua would have afforded a cause of nullity, to attempt to do so would, in my view, be an irrelevant excursion"[237].

The only dissenting Judge in this case, Judge *ad Hoc* Urrutia Hologuin, did not challenge the assumption that the doctrine of "estoppel" was recognized in international law. His objection on this point rested on a different appreciation of the facts[238].

As already referred to, the judgement of the International Court of Justice in the Temple case[239] rested squarely on the ground of "preclusion", coupled with recognition. The concluding passage of the decision thus reads:

"The Court will now state the conclusions it draws from the facts as above set out.

Even if there were any doubt to Siam's acceptance of the map in 1908, and hence of the frontier indicated thereon, the Court would consider,

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[235] *Ibid.*, p.212.

[236] *Ibid.*, p.214.

[237] *Ibid.*, p.226.

[238] *Ibid.*, p.222:

"The objection on the ground of good faith which exists in almost all legal systems and which prevents a party from profiting by its own misrepresentation and which, in Anglo-Saxon law, is known as estoppel, would be applicable in the present case if it were proved that the action and behavior of one of the states caused the other state to place reliance upon its acts of acquiescence and to believe in its renunciation of its rights to dispute the validity of the Award

in the light of the subsequent course of events, that Thailand is now precluded by her conduct from asserting that she did not accept it. She has, for fifty years enjoyed such benefits as the treaty of 1904 conferred on her, if only the benefit of a stable frontier. France, and through her Cambodia, relied on Thailand's acceptance of the map. Since neither side can plead error, it is immaterial whether or not this reliance was based on a belief that the map was correct. It is now not open to Thailand, while continuing to claim and enjoy the benefits of the settlement, to deny that she was ever a consenting party to it.

The Court, however, considers that Thailand in 1908–1909 did accept the Annex I map as representing the outcome of the work of delimitation, and hence recognized the line on that map as being the frontier line, the effect of which is to situate Preah Vihear in Cambodian territory"[240].

The Court based its decision on consideration of conduct of the parties, subsequent to the period 1904–1909. It placed special importance, in this connection, on the following incident: In 1930 Prince Damrong, formerly Minister of the Interior of Thailand, paid a visit to the Temple, where he was received officially by the French Resident for the adjoining Cambodian Province, on behalf of the Resident Superior, with the French flag flying. The Court observed that:

"The Prince could not possibly have failed to see the implications of a reception of this character. A clearer affirmation of title on the French Indo-Chinese side can scarcely be imagined. It demanded a reaction. Thailand did nothing. Furthermore, when Prince Damrong on his return to Bangkok sent the French resident some photographs of the occasion, he used language which seems to admit that France, through her Resident, had acted as the host country . . . Looking at the incident as a whole it appears to have amounted to a tacit recognition by Siam of the sovereignty of Cambodia (under French protectorate) over Preah Vihear, through a failure to react in any way, on an occasion that called for reaction in order to affirm or preserve title in the face of an obvious rival claim"[241].

Another example of "estoppel", by record this one, can be found in the Court's judgement in this case, inasmuch as Thailand's arguments before it were inconsistent. The Court stated that:

"Thailand cannot allege that she was under any misapprehension in accepting the Annex I line, for this is wholly inconsistent with the

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[239] *I.C.J. Reports*, 1962.
[240] *Ibid.*, p.32.
[241] *Ibid.*, p.30/1.

reason she gives for her acts on the ground, namely that she believed herself to possess sovereignty in this region"[242].

In his dissenting opinion Judge Sir Percy Spender, while completely separating the legal consequences of the concepts of recognition and acquiescence from that of "estoppel"[243] and while holding that:

> "phrases such as 'a party may not blow hot and cold' or *'allegans contraria non audientus est'* and others to the same effect do not . . . express general principles of international law"[244],

nevertheless endorsed "the principle of preclusion" as a "beneficient and powerful instrument of substantive international law"[245].

But, conceiving of the principle as operating:

> "to prevent a state contesting before the Court a situation contrary to a clear and unequivocal representation previously made by it to another state, either expressly or impliedly, on which representation the other state was, in the circumstances, entitled to rely and in fact did rely, and as a result that other state has been prejudiced or the state making it has secured some benefit or advantage for itself".

He considered that these elements had not been established by Cambodia, because neither party suffered any prejudice or secured some advantage or benefit. Therefore he found the principle to have no application in the case.

While the Arbitral Tribunal which issued the Award in the boundary dispute between the Argentine Republic and the Republic of Chile[246] endorsed vice-president Alfaro's observations, in the Temple case, on the function of the "estoppel" principle in international law, it, too, found upon perusal of the facts that this theory, invoked by both parties to the litigation, did not suffice to found a valid argument[247].

## D. *SUMMARY*

In the foregoing pages it was proposed to demonstrate, through a perusal of contemporary practice and jurisprudence, that the institution of the international boundary cannot be constituted by acts deprived of consensual basis.

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[242] *Ibid.*, p.33.
[243] See *Ibid.*, pp.130-132.
[244] *Ibid.*, p.143.
[245] *Loc. cit.*
[246] *Op.cit.*
[247] *Ibid.*, pp.67/8.

It could be argued that the "estoppel" rule, based, as it is, on the general principle of *bona fides*, is an exception in this connection.

Whereas, however, the "estoppel" principle is clearly admitted in theory as an independent device for determination of title it has never been applied in practice or adjudication (as far as the present author could find), in the context of this study, as more than a procedural rule – as a consequence of juridically operative consent. Indeed, this conclusion rather confirms the above observation as to the irreplaceable role of assent between adjacent states in the process of delimitation.

Although, as this section demonstrates, this function can be performed through unilateral acts which become effective upon communication on the part of all limitrophe states, the device of consent – elastic, formal and therefore certain and reliable – is much better suited for this purpose.

## SECTION 3: CONVENTIONAL DELIMITATION

Conventional delimitation operates on the basis of consent, which distinguishes itself from recognition and acquiescence by the requirement of a meeting of wills, and postulates acceptance of an offer or some other form in which the meeting of wills may take place.

In the context of delimitation of international land boundaries the entry into consensual engagements for this purpose, in the absence of prior obligations to the contrary, is purely facultative; i.e. conterminous states are generally under no obligation to institute procedures in order to delimit their respective boundaries[248].

As boundary problems may, however, cause disputes in the meaning of Article 33 of the Charter of the United Nations, the institution of procedures provided therein for this purpose may become obligatory upon contending states[249].

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[248] Things are somewhat different as to maritime international boundaries. *Infra*, Chapter Four, Section 3.

[249] Article 33 reads:

"1. The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security shall, first of all, seek a solution by negotiation, inquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies and arrangements, or other peaceful means of their own choice.

2. The Security Council shall, when it deems necessary, call upon the parties to settle their disputes by such means".

In this context it should also be noted that the numerous treaties providing for modes of pacific settlements of international disputes, contracted in the last half century[250], contain very few reservations concerning boundary delimitation[251]. Many states are thus conventionally bound to resolve their boundary differences according to procedures provided for in such treaties.

In cases where no contention is involved in the matter of delimitation, the choice of an appropriate procedure is purely optional, and responds to no legal obligation, the only juridical problem being that of the competence to delimit. Clearly, however, where no dispute arises between the parties the procedure chosen will be that of direct negotiation, not because of legal imperatives, but due to political expediencies.

The elastic device of negotiation is, thus, of capital importance in the context of boundary-making[252]. It is, therefore, the only procedure examined in this section; other procedures, involving third parties, are discussed in the next chapter.

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[250] See HABICHT, *Post War Treaties; Systematic Survey.*

[251] There are some instances of reservations concerning territorial integrity (See Czechoslovakia-Poland, Treaty of Conciliation and Arbitration, signed at Warsaw, April 23, 1925, Article I in HABICHT, *ibid.*, p.232; also see *Systematic Survey*, p.25).

In some cases the reservation as to territorial integrity does not apply to "ordinary" boundary disputes. Cf. Germany-Switzerland, Treaty of Conciliation, Arbitration and Compulsory Adjudication, signed at Berne, December 3, 1921, Articles 4 of Treaty and I of attached Protocol. HABICHT, *ibid*, p.20; reservation of Paraguay to the General Treaty of inter-American Arbitration, signed at Washington on January 5, 1929;

> "I sign this Treaty with the reservation that Paraguay excludes from its application questions which directly or indirectly affect the integrity of the national territory and are not merely questions of frontiers or boundaries"

(*Systematic Survey*, p.504).

The Treaty of Berne, February 3, 1926, between Rumania and Switzerland leaves either party free to withdraw from its application "any dispute affecting directly or indirectly questions concerning the territorial integrity or the present boundaries of the parties" (See. Article I HABICHT, *Post War Treaties*, p. 372 at p.374); Guatemala made the following reservation to the General Treaty of inter-American Arbitration (*op.cit.*):

> "1) In order to submit to Arbitration any question relating to the boundaries of the Nation, the approval of the Legislative Assembly must first be given, in each case, in conformity with the Constitution of the Republic"

(*cf. Systematic Survey*, p.503).

[252] As the I.C.J. pointed out in the Continental Shelf Cases (*I.C.J., Reports*, 1969, p.I, at p.47):

> "There is no need to insist upon the fundamental character of this method of settlement, except to point out that it is emphasized by the observable fact that judicial or arbitral settlement is not universally accepted".

## A. *THE PARTIES*

The competence to delimit is an attribute of territorial sovereignty. Accordingly, stipulations by limitrophe states with third parties as to the mode of determination between adjacent states of their international boundaries are not directly relevant, juridically, although their political impact may, of course, be considerable.

Thus, the remark attached to Article II of the peace treaty signed in Moscow, on July 12, 1920, between Lithuania and the Russian Soviet Federative Socialist Republic[253] which stipulated that "The frontier line between Lithuania and Poland, and between Lithuania and Latvia, will be fixed by arrangement with these states" could not endow the R.S.F.S.R. with any *locus standi* in the matter (apart from considerations of its importance *in personam*, which is not a directly relevant question in the present context).[254]

When Pakistan and the People's Republic of China decided to initiate negotiations on delimitation of the "boundary between China's Sinkiang and the contiguous areas, the defence of which is under the actual control of Pakistan . . . with a view to ensuring tranquillity along the border and the growth of good-neighbourly relations between the two countries"[255] both parties were aware of Pakistan's defective territorial status in the areas of which they sought delimitation[256]. They emphasized, therefore, that

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[253] SHAPIRO, *Soviet Treaty Series*, Vol. I. p.50.

[254] In relation to the Vilno conflict between Poland and Lithuania, the Soviets based rejection of violation of "Lithuanian boundaries" and decision of the Conference of Ambassadors and of the Council of the League of Nations on the Polish-Lithuanian boundary, *inter alia*, on this stipulation. See note from Chicherin to the Polish Foreign Minister of April 5, 1923 (Degras, *Soviet Documents*, Vol. I, pp.382/3); Note from Chicherin to the Lithuanian Minister in Moscow, of March 8, 1924 (*Ibid.*, p.429) stating that:

> "The government of the U.S.S.R. . . . considers it necessary to direct the attention of the Lithuanian government to the fact that the special commission of the so-called League of Nations . . . referred in its work to the question of the boundary dispute between Lithuania and Poland. It must remind the Lithuanian government that the method of settling boundary disputes between Lithuania and Poland and of establishing the state frontier between them is laid down in Note I to Article 2 of the Peace Treaty of 12 July, 1920 between Russia and Lithuania, and that the Lithuanian government cannot, without the consent of the U.S.S.R., invite third parties to settle the question".

And see also DUROSELLE, *op.cit.*, p.79.

[255] Sino-Pakistani Agreement on boundary negotiations, 3 May 1962 (*Dawn*, 5 May 1962; also *Peking Review*, 2 May 1962, p.10; *Doc. on China's relations*, p. 217; HASAN, *China, India, Pakistan*, p.366.)

[256] Following the 1949 cease-fire between India and Pakistan, the latter administrates the North-East of the state of Jammu and Kashmir, and by consequence has a common frontier with Communist China. This border in Hunza and Baltistan is the only one Pakistan has with China.

the agreement to delimit the boundary (which "has never been formally delimited and demarcated in history"[257]) would be of a "provisional nature" so that "after the settlement of the dispute over Kashmir between Pakistan and India, the Sovereign authorities concerned shall reopen negotiations with the Chinese Government regarding the boundary of Kashmir so as to sign a formal boundary Treaty to replace the provisional agreement"[258].

The Indian government, holding on to its conception that "natural" boundaries do not require "formal" delimitation and estimating, no doubt, that agreement on a Sino-Pakistani boundary in Kashmir will weaken the Indian case *vis-à-vis* Pakistan[259], immediately dispatched angry notes of protest to Karachi and Peking[260].

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Sovereignty over Jammu and Kashmir, however, is contested between India and Pakistan ever since the partition of British India and creation of the two states (See BRINES, R. *The Indo-Pakistani Conflict*, London, Pall Mall Press, 1968; SYATAUW, J.J.G. *Some Newly Established Asian States and the Development of International Law*. The Hague, Martinus Nijhoff, 1961, pp.134-168).

[257]The boundaries between Kashmir and Sinkiang and Tibet were never defined during the British period (See LAM B, Alistair. *Asian Frontiers*. London, Pall Mall Press, 1966; p.102 ff).

[258]*Loc. cit.*

[259]Nehru claimed that the action of China and Pakistan amounted to "interference with India's sovereignty over Kashmir". HASAN, *op.cit.*, p.415.

[260]See *White Paper No. VI*, p.96, Note given by the Ministry of External Affairs, New Delhi, to the Embassy of China in India, 10 May, 1962, wherein the government of India:

> "Solemnly warns the government of China that any change, provisional or otherwise, in the status of the state of Jammu and Kashmir brought about by third parties which seek to submit certain parts of Indian territory to foreign jurisdiction will not be binding on the government of India . . . the government of India firmly repudiate any agreement provisional or otherwise regarding her own territories arrived at between parties who have no legal or constitutional *locus standi* of any kind".

On May 3 Peking informed the Indian Embassy by Note (*Ibid.*, p.99) that it had never accepted without reservation the position that Kashmir was under Indian sovereignty and that, therefore it had a right to conduct boundary negotiations with Pakistan. It emphasized, however, that these negotiations do not at all involve the question of the ownership of Kashmir, which it considers an outstanding issue between India and Pakistan (See also Note given by the Ministry of External Affairs, New Delhi, to the Embassy of China in India, 30 June, 1962, *ibid.*, p.103).

On May 10, 1962, India lodged an emphatic protest with the government of Pakistan, warning the latter that "the government of India would not be bound by the results of any such bilateral discussions between Pakistan and the People's Republic of China, should these discussions concern the boundaries of Jammu and Kashmir", and further reiterating that:

> "the international boundary alignment in the sector west of the Karakoram pass of the boundary of Jammu and Kashmir state of India follows well-known natural features, has been recognized by history for all these years, and does not require fresh delimitation"

(See *Foreign Affairs Record*, Vol. VIII, pp.139-140).

In a Note of August 9, 1962 (Handout of the Government of Pakistan. *Sino-Pakistan Border talks, India's protest rejected*, 23 August, 1962), the Pakistani government rejected the India protest, emphasizing that India's claim to sovereignty over Kashmir was never accepted by Pakistan.

On December 28th, 1962, however, a joint Communiqué was issued by both governments, announcing "agreement in principle" on location and alignment of the Sino-Pakistani boundary[261]. Upon this India lodged a protest with China[262].

On March 2nd, 1963, the two states concluded a delimitation agreement on the boundary between "China's Sinkiang and the contiguous areas, the defence of which is under the actual control of Pakistan"[263]. This was also not supposed to prejudice the Chinese conception on the function of delimitation[264].

This agreement further aggravated India's discontent, since it partly satisfied Chinese territorial revendications, and bestowed it with a vested interest in perpetuating the existing *status quo* in Kashmir[265].

India, therefore, protested to China[266], to Pakistan[267] and, on March 16, 1963, before the Security Council, wherein it complained that "the Government of Pakistan signed an Agreement with China about an area in which both these countries have no *locus standi*, except that of aggressors"[268].

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[261] *Peking Review*, 28 December, 1962.

[262] See Note of 31 December, 1962. *White Paper VIII*, pp.47/8.

[263] See *International Legal Materials* Vol. 21; *A.J.I.L.*, Vol. 57. p.713.

[264] Article One reads:

"In view of the fact that the boundary between China's Sinkiang and the contiguous areas, the defence of which is under the actual control of Pakistan, has never been formally delimited, the two parties agree to delimit it on the basis of the traditional customary line. . ."

Article Six reads:

"The two parties have agreed that after the settlement of the Kashmir dispute between Pakistan and India, the sovereign authority concerned will re-open negotiations with the Government of the People's Republic of China, on the boundary, as described in Article Two of the present Agreement, of Kashmir, so as to sign a Boundary treaty to replace the present agreement.

Provided that in the event of that sovereign authority being Pakistan, the provisions of this agreement and the aforesaid protocol shall be maintained in the formal Boundary Treaty to be signed between Pakistan and the People's Republic of China".

*Loc.cit*

[265] Note difference between last paragraph of above cited Article Six of the delimitation agreement and the agreement on boundary negotiations of 3 May 1963 (*op.cit.*)

[266] See Note given by the Indian Ministry of External Affairs to the Chinese Embassy, 2 March 1963 (*White Paper No. IX*, pp.2/3); also Note given by the Chinese Ministry of Foreign Affairs to the Indian Embassy, 21 February 1963 (*ibid.*, pp. 1/2).

[267] See Note of the High Commission of India in Pakistan, March 5, 1963; Note of the Indian Ministry of External Affairs to the Pakistan High Commission, March 13, 1965; Note of the Pakistan Government, April 20, 1965 (HASAN, *op.cit.*, pp.391, 391-3, 393 respectively).

[268] *S.C.O.R.*, 18th year, supplement for January–March 1963, Document *S/5263*, pp.133–141.

On April 10, 1963, the Permanent Representative of Pakistan replied, by a letter to the President of the Security Council[269], that:

> "The Agreement does not prejudice any contingent interest that India might derive from the jointly accepted resolutions of the United Nations Commission for India and Pakistan of 13 August, 1948 and 5 January, 1949 in the territory of Jammu and Kashmir."

The delimitation of international boundaries can, usually, be achieved by a bilateral agreement. There are many instances, however, where the boundaries of three (or even four) states meet at a nodal point, which is called a triple point or "*triplex confinium*". Thirteen such nodal points exist in South America, about fifty-one in Africa, twenty-eight in Asia and twenty in Europe. The definition of such points is a matter for multilateral agreement, and might prove very difficult in areas of widely overlapping territorial claims[270].

Thus, in relation to the Sino-Indian boundary dispute, an additional controversy arose between the two states, prompted by the Sino-Burmese delimitation treaty[271]. This, according to the Chinese, left the trijunction of India, Burma and Pakistan undefined[272].

The Indian government complains, however, that the Treaty refers to "the entire boundary between Burma and China"[273] and claims that the "traditional" nodal point is well-known and requires no further definition[274].

The Chinese state that the nodal point was not defined between themselves and the Burmese government "because China and India still differ in their understanding of the Eastern sector and a settlement through negotiations was yet to be achieved"[275].

The real controversy, thus, is not whether the nodal point was defined or not, but the implications of this question on the heart and core of the pending boundary dispute. As the Indian government emphasized:

> "it is of no concern to the Government of India, as contended by the Chinese Government, whether textually or in cartographic representation of the text of the Sino-Burmese Boundary Treaty the Western extremity of the

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[269] *S.C.O.R.*, 18th year, Supplement for April–June 1963, Document *S/5280*, pp.17-24.

[270] See BOGGS, *International Boundaries*, pp.80-85; JONES, *Boundary Making*, pp.160-162.

[271] For text see *Indian Journal of International Law*, Vol. I, (1961) p.695.

[272] See memorandum of the Chinese government, 21 February, 1961, *White Paper No. V.*, p.21.

[273] See Note given by the Ministry of External Affairs, New Delhi, to the Embassy of China in India, 30 March, 1961 (*Ibid.*, p.23).

[274] Note given by the Ministry of External Affairs, New Delhi, to the Embassy of China in India, 16 June, 1961 (*Ibid.*, p.31).

[275] Note of 6 August, 1961 (*Ibid.*, p.34).

Sino-Burmese boundary has been left "undefined". The reason adduced by the Chinese government for such incomplete boundary Treaty is that China and India differ in their understanding of the Eastern sector of the Sino-Indian boundary. This is an unwarranted misrepresentation of the position of the Government of India in regard to this matter. The Government of India is not aware of any doubt affecting this or other sector of India's boundary with China"[276].

The Chinese government reiterates its position that:

"once the Sino-Indian boundary is formally delimited through negotiations . . . the question of the western extremity of the Sino-Burmese boundary will be finally settled along with it . . the above described way of dealing with the question in the Sino-Burmese boundary treaty does not affect at all the respective positions held by the Chinese and the Indian sides on the Sino-Indian boundary"[277].

## B. *THE PROCEDURE*

### i) *Direct Negotiations*

Due to its asymmetric nature[278], negotiation – "the legal and orderly administration process by which governments, in the exercise of their unquestionable powers, conduct their relations one with another and discuss, adjust and settle their differences"[279] – is a specially well-suited procedure for boundary delimitation. Most modern delimitations have been effected by bilateral treaties following direct negotiations. Disputes, sometimes requiring other methods for adjustment, usually arose on questions of interpretation.

The delimitation of the international boundaries of the United States is a case in point.

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[276] Indian Note of 19 September, 1961 (*Ibid.*, p.37).

[277] Chinese Note of November 20, 1961. *White Paper No. VI*, p.95.

[278] BOULDING, K. *Conflict and Defense*. New York, Harper and Bros., 1962; p.314: "Bargaining is a positive-sum game, frequently non-symmetrical between the parties, in which there is a curious mixture of cooperation and conflict – cooperation in that both parties with a certain range of possible solutions will be better off with a solution, that is, a bargain, than without one and in conflict in that, within the range of possible solutions, the distribution of the total benefit between the two parties depends on the particular solution adopted".

[279] Mavromatis Palestine Concession Case (1924), *P.C.I.J., Series, A*, No. 2. p.62.

Of the 3,987 mile northern boundary with Canada, a line measuring 2,540 miles, from the Atlantic Ocean to the northwestern-most point of the Lake of the Woods, had been defined between the United States and Great Britain in the 19th century[280]. Later treaties settled the whole boundary from the Atlantic to the Pacific. Incorrect description, due to insufficient geographical knowledge, made demarcation of these "paper boundaries based upon insufficient surveys" extremely difficult, so that:

> Between 1782 and 1925 the United States–Canada boundary was a subject of negotiation in at least seventeen treaties, conventions, and protocols which have gone into force, and of others which failed to be ratified or completed. There have been two arbitrations. A number of international Commissions have been appointed to settle details in dispute relating to the interpretation of treaty provisions"[281].

The boundaries in Alaska were defined between Great Britain and Russia on February 16/28, 1825[282]. A Convention signed at Washington on January 24, 1903[283] provided for the creation of a Tribunal to consider seven questions relating to interpretation of the Anglo-Russian delimitation treaty[284].

The international boundary between Mexico and the United States was delimited by bilateral treaties, following direct negotiations, signed by Spain and the United States[285], confirmed by Mexico after independence (1821)[286], and rectified after the admission of Texas as a state (December 29, 1845) and the following war by the Treaty of Peace of Guadalupe Hidalgo, on February 2, 1848[287], and by the Treaty of Mexico City, December 30, 1853[288].

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[280] The Provisional Articles of Peace signed between Great Britain and the United States at Paris on November 30, 1782 (*MALLOY's Treaties* 1910. Vol. I, p.580) provided for these boundaries. The definite Treaty of peace signed at Paris on September 3, *ibid.*, Vol. I, p.586; *BFSP*, Vol. I, pp.1, 779) repeated the Provisional Articles relating to boundaries *verbatim* as its Article 2. And see IRELAND, G. *Boundaries Possessions and Conflicts in Central and North America and the Carribean.* Cambridge, Massachussetts, Harvard University Press, 1941; pp.270-273.

[281] BOGGS, *International Boundaries*, pp.33-54; Ireland, *ibid.*, pp. 268-313.

[282] *B.F.S.P.*, Vol. 12, p.38; MARTENS, *Recueil*, Vol. 6 (1828), II, p.684.

[283] *HERTSLET's Treaties*, Vol. 23, p.1242; *MALLOY's Treaties*, Vol I, p.787; MARTENS, *N.R.G.*, 2e. Série, Vol. 31 (1904), p.494; *B.F.S.P.*, Vol. 96, p.84.

[284] For decision of October 20, 1903, See *U.S. For Aff.* Vol. X, (1932), p.618; *Cmd.* 1877 (1904).

[285] Treaty of Friendship, Boundaries and Navigation, signed at San-Lorenzo de Real on October 27, 1795 (*U.S. Treaty Series*, No.325); Delimitation Treaty signed at Washington, February 22, 1819 (*U.S. Treaty Series*, No.327).

[286] Treaty signed at Mexico City between Mexico and the United States on January 12, 1827 (MARTENS, *N.R.G.*, Vol. XII (1837).

[287] *U.S. Treaty Series*, No.207; *B.F.S.P.*, Vol.37, p.567; MOORE, John B. *Digest of International Law*. Washington, Government Printing Office, 1906; Vol.I, p.458.

The dispute between the United States and Mexico as to the Chamizal tract in El-Paso, Texas, originated in these latter treaties, which defined the boundary by reference to rivers.

A Convention signed at Washington on November 12, 1884[289] cited the Treaties of 1848 and 1853 as to the channels of the Rio Grande and the Rio Colorado and provided that "the dividing line shall forever be that described in the aforesaid treaty and follow the center of the normal channel of the rivers named. . ." (Article I).

Changes in the channel of the Rio Grande between El-Paso, Texas, and Ciudad Juarez, Chibualrua, caused a contention between Mexico and the United States as to the exact location of the international boundary therein.

Consequently, both states signed at Washington, on June 24, 1910[290] an arbitration convention referring the dispute to the International Boundary Commission established by them in 1889[291] for final and conclusive settlement. The award, delivered on June 15, 1911[292] was, however, rejected by the United States government on several grounds, and in the understanding that the governments concerned could proceed at once to settle their differences through negotiation[293].

Since 1911 many attempts were made to resolve the controversy. Proposals for settlement have varied, and many practical means were explored at one time or another[294].

In June 1962, during President Kennedy's visit to Mexico[295], President Lopez Mateos urged that a further attempt be made, and President Kennedy agreed[296]. The two Presidents instructed their respective executive agencies to recommend a complete solution. This recommended solution was announced on July 18, 1963[297] after nearly six months of negotiations. The recommendations, following generally the solution set forth in the international arbitral award of 1911, formed the basis of the Convention signed at Mexico City on August 29, 1963, settling the Chamizal boundary[298].

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[288] *U.S. Treaty Series*, No. 208; *A.J.I.L.*, Vol. 26 (1932), p.43; MOORE, *ibid.*, p.460.

[289] *U.S. Treaty Series*, No. 226; MARTENS, *N.R.G.*, 2e. Série, Vol. 13 (1888), p.675.

[290] *U.S. Treaty Series*, No. 555; *A.J.I.L.*, Vol. 4 (1910), p.925; *ibid.*, Vol. 5 (1911), supp., p.117; *MALLOY's Treaties*, Vol. 3, p.2729; MARTENS, *N.R.G.*, 3e. Sér. Vol.4 (1911), p.719.

[291] *A.J.I.L.*, Vol. 5 (1911), suppl., p.120; *MALLOY's Treaties*, Vol. 3, p.2732; MARTENS, *N.R.G.*, 3e. Sér. Vol. 4 (1911), p.724; *B.F.S.P.*, Vol. 103, p.591.

[292] *U.S. For. Rel.*, 1911, p.573.

[293] See *Department of State Bulletin*, Vol. 49, (1963), p.199;

[294] CUKWURAH, pp.203–206.

[295] *Keesing's Contemporary Archives*, 1961-2, p.18923.

[296] *Department of State Bulletin*, July 23, 1962, p.135.

[297] State Department Bulletin, July 18, 1963 (*Press Release 375*).

[298] *Department of State Bulletin*, Vol. 49 (1963), p.48; *A.J.I.L.*, Vol. 58 (1964), p.336.

Delimitation of international boundaries in South America "has been a matter of controversy since the days of Bolivar"[299] because most of these boundaries have their roots in the colonial history of the continent. None of the Spanish Provincial boundaries had been defined with such precision as to be adapted for acceptance by the newly formed Republics, after the process of emancipation began, without difficulties in interpretation. The number of disputes was, therefore, great. Nonetheless, many of these boundaries were delimited, from 1850 up to the Second World War, through direct negotiations. This fact amply demonstrates the suitability of the procedure, although settlements were undoubtedly facilitated by the operation of the politico-moral concept of *Hispanidad*.

A case in point is the delimitation of the boundary between Guatemala and Salvador. The two states, in a three month exchange of four notes and a subsequent conforming treaty delimited their entire boundary.

By an exchange of notes of August 17 and 23, 1935, the governments of Guatemala and Salvador agreed to establish their boundary. In another exchange of notes of September 12 from Guatemala and October 15, 1935, from Salvador, it was agreed to set up a Joint Delimitation Commission of one delegate from each state and a third from a neutral party. This Commission held numerous meetings and agreed to proceed to define a boundary line according to principles it had agreed upon beforehand. The Commission's alignment was approved by the executives and legislatures of both states and thus recorded in the delimitation treaty signed at Guatemala City on April 9, 1938[300].

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The political role of the United States in the process of boundary delimitation in Latin America has been preponderate sometimes, mostly through good offices and mediation[301]. In Central America it took, on occasion, other forms.

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[299] See WOOLSLEY, L.H., *"Boundary Disputes in South America"*. *A.J.I.L.*, Vol.25 (1930), pp. 324-333.

[300] *L.N.T.S.*, Vol. 189 (1938), p.275.

[301] See *infra*, Chapter Two, Section 1.

Thus, whereas the boundaries of British Honduras were established through direct negotiations with its neighbours – Guatemala[302] and Mexico[303], the boundary between the Dominican Republic and Haiti was delimited between the acting governments of the two nations, on January 21, 1929[304] while the island was under United States' occupation, and the United States undoubtedly exerted steady pressure toward this agreement[305].

The delimitation of the boundary between Colombia and Panama was complicated by serious questions with another power, the United States, involved in the separation of Panama from Colombia, and it took over thirty years to establish the boundary. On April 6, 1924[305] the United States and Colombia signed a treaty which provided (Article 4) that:

> "The Republic of Colombia recognizes Panama as an independent nation, and agrees that the boundaries between the two states. . . shall be as follows: . . .".

Accordingly, Colombia and Panama signed at Bogota, on August 20, 1924 a delimitation treaty[307] by which the same boundary as agreed between the United States and Colombia was established.

The boundaries of Brazil trace their origin to the limits of Portuguese and Spanish colonization of South America, based upon the "demarcation line" defined between Spain and Portugal – after the attempt of Pope Alexander VI in 1493 to delimit the respective possessions of the two states in the New World[308] – by the treaties of Tordesillas, 1494[309], of Madrid, January 13, 1750[310] and San-Ildefonso, of October 1, 1777[311].

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[302] After negotiations beginning in 1857 (*B.F.S.P.*, Vol.50, pp.135, 143, 300-303) a boundary agreement was reached on the basis of actual British occupation, and embodied in the delimitation treaty signed at Guatemala City on April 30, 1859 (*B.F.S.P.*, Vol.49, p.79; MARTENS, *N.R.G.*, Vol. 15 (1857), p.158; *ibid.*, Vol.16 (1860), II, p.366; *ibid.*, 3e. Sér., Vol. 26 (1933), p.45).

[303] Delimitation treaty concluded at Mexico City on July 8, 1893. *B.F.S.P.*, Vol.85, p.58; MARTENS, *N.R.G.*, 2e. Sér., Vol. 25 (1900), p.331.

[304] *A.J.I.L.*, Vol. 25 (1931), p.332; *L.N.T.S.*, Vol. 105 (1930), p.193.

[305] *U.S. For. Rel.*, 1920, Vol. I, p.295-311; *ibid.*, 1921, pp.228-231; *ibid.*, 1922, Vol. I, pp.434-442; *Ibid.*, 1923, Vol. I, pp. 356-362.

[306] See *U.S. Treaty Series*, No. 661.

[307] *L.N.T.S.*, No. 841, Vol. 33, (1925), p.168.

[308] See REEVS, J.S. *"International Boundaries"*. *A.J.I.L.*, Vol. 38 (1944), pp.533-545.

[309] MOORE, *International Arbitration*. Vol. 2, p.1970.

[310] *Ibid.*, pp.1971-2, 1977.

[311] *Ibid.*, pp.1973, 1970-80; *B.F.S.P.*, Vol. 6, p.706.

All of Brazil's ten international boundaries have thereafter been peacefully delimited[312]; five of them through direct negotiations with its neighbours: Bolivia[313]; Peru[314]; Uruguay[315]; Venezuela[316]; Dutch Guiana[317].

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Though the action of the League of Nations helped much to defuse and settle the Leticia dispute between Colombia and Peru[318], and was of "invaluable aid in separating combatants and assisting towards a negotiated settlement"[319], the boundary question, which was the core of the conflict, was settled by the parties themselves, through direct negotiations[320]. Thus proceeding, Colombia followed its former practice with Ecuador[321].

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[312] See D'ECA, Raul. "The Amicable Settlement of the Brazilian Boundary Disputes". *Bulletin of the Pan-American Union*, Vol. 69 (March 1935), pp.155-168.

[313] The treaty signed at La Paz on March 27, 1867 (*B.F.S.P.*, Vol. 59, pp.1161-1169; MARTENS, *N.R.G.*, Vol. 20, pp.613-621) recognized as a basis for the boundary the *uti-possidetis*, and defined the boundary. Another delimitation treaty was signed at Petropolis on November 17, 1903 (*B.F.S.P.*, Vol. 96, pp.383-387; MARTENS, *N.R.G.*, 3e. Sér., Vol. 3, pp.62-70). Two delimitation protocols were signed at La Paz, on September 3, 1925 (*Trat. Vig.* (Bolivia, 1925), Vol. III, Apen., pp. 16-23), and were substantially carried into a treaty signed at Rio de Janeiro on September 25, 1928 (*B.F.S.P.*, Vol. 128, pp.677-680).

[314] Delimitation treaty of Lima, October 23, 1851 (*B.F.S.P.*, Vol. 42, pp.1308-1312); of Lima, February 11, 1874 (*B.F.S.P.*, Vol. 65, pp.630-631).

A controversy over the Acre region was settled, after the reception of certain suggestions from the Pope, by the delimitation treaty of Rio de Janeiro, September 8, 1909 (*B.F.S.P.*, Vol. 102, pp.199-202; MARTENS, *N.R.G.*, 3e. Sér. Vol. 6, pp.849-852.)

[315] Delimitation treaty of Rio de Janeiro, October 12, 1851 (*B.F.S.P.*, Vol. 40, pp.1151-1154); supplementary treaty of Montevideo, May 15, 1852 (*B.F.S.P.*, Vol. 42, pp.1265-1267); Treaty of cession, signed at Rio de Janeiro on October 30, 1909 (*B.F.S.P.*, Vol. 102, pp. 204-207; MARTENS, *N.R.G.*, 3e. Sér., Vol. 6, pp.858-865).

The alignment was modified in the delimitation treaty of Rio de Janeiro, May 7, 1913 (*B.F.S.P.*, Vol. 107, pp.610-611; MARTENS, *ibid.*, Vol. 20 (1920), pp.511-512).

[316] Delimitation treaty of Caracas, November 25, 1852 (*B.F.S.P.*, Vol. 49, pp.1213-1215); of Caracas, May 5, 1859 (*B.F.S.P.*, Vol. 50, pp.1164-1169; MARTENS, *N.R.G.*, Vol. 17 (1869), 11, pp.161-167).

[317] Delimitation treaty of Rio de Janeiro, May 5, 1906 (*B.F.S.P.*, pp.932-933; MARTENS, *N.R.G.*, 3e. Sér., Vol. 3 (1911), pp.70-71).

[318] See WOOLSLEY, L.H. *"The Leticia Dispute between Columbia and Peru"*. *A.J.I.L.*, Vol. 27 (1933), pp.317-324; *ibid.*, Vol. 29 (1935) pp. 94-99; WINDAS, Stan. The League and Territorial Disputes in *The International Regulation of Frontier Disputes*, Edited by LUARD, Evan. London, Thames and Hudson, 1970; pp. 75-83.

[319] *Ibid.*, p.83.

[320] On May 24, 1934, representatives of both states signed at Rio de Janeiro a protocol of peace, friendship and cooperation and an additional act, which brought about a settlement of the dispute over the territory of the "Leticia trapezium", fronting the Amazon river.

Article 2 of the Protocol recited that the boundary treaty of March 24, 1922 (*L.N.T.S.*, No. 1726, Vol. LXXIV, pp.10-17) "constitutes one of the juridical ties which bind Colombia and Peru and

Since 1945, the procedure of direct negotiations has been successfully used between Afghanistan and the U.S.S.R.[322] ; between China and a number of her neighbours (Burma[323] ; Nepal[324] ; Pakistan[325] ; Afghanistan[326] and Mongolia[327]); between India and Pakistan[328] ; between the Netherlands and the Federal Republic of Germany[329] ; between Belgium and the Federal Republic of Germany[330] ; between the United States of America and Mexico[331] ; between Mali and Mauritania[332] ; between the United Kingdom and Portugal[333] ; between France and Libya[334] ; between Yugoslavia and Rumania[335] and in a number of other cases[336] .

Whereas in the case of China's boundaries (and the East Bengal–Indo-Pakistani boundary) direct negotiations led to original delimitation of boundaries, in all the other cases this procedure was resorted to for boundary modifications or rectifications only.

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may not be modified or ratified except by mutual conset of the parties or by a decision of International Justice. . ."
(See WOOLSLEY, *A.J.I.L.*, Vol. 29 (1935), p.99).

[321] *B.F.S.P.*, Vol. 110, pp.826-929; MARTENS, *N.R.G.*, Vol. 21, pp.193-195 (delimitation treaty of Bogota, July 15, 1916).

[322] Frontier Agreement, signed at Moscow, on 13 June, 1946. *U.N.T.S.*, (No. 476), Vol.31, (1949), p.147.

[323] *Keesing's Contemporary Archives.* Vol.12 (1959-1960), p.17270; *Indian Journal of International Law.* Vol. I (1961), p.695; *Peking Review*, No.40, October 4, 1960.

[324] *Keesing's Contemporary Archives, ibid.*, p.17743; *ibid.*, Vol. 13 (1961-1962), p.19026; *Indian Journal of International Law, ibid.*, p.704.

[325] *Keesing's Contemporary Archives*, Vol. 14 (1963-1964), p.19427; *A.J.I.L.*, Vol.57, p.713.

[326] *Keesing's Contemporary Archives, ibid.*, p.19761; *International Legal Materials*, Vol. 4, (1965), pp.1059-1069.

[327] *Keesing's Contemporary Archives, ibid.*, p.19203.

[328] East-West Bengal Boundary Alignment Agreement; signed at New Dehli on August 21, 1952. Text in *U.N.T.S.*, (No. 2805), Vol. 207, p.161.

[329] *The Times*, London, February 22, 1963, p.11 and July 30, 1963, p.9; *Keesing's Contemporary Archives*, Vol. 12 (1959-1960), p.17522; *U.N.T.S.*, (No. 7404), Vol. 508 (1964), p.148.

[330] *U.N.T.S.*, (No. 4549), Vol. 314, p.195.

[331] *U.N.T.S.*, (No. 7374), Vol. 505, p.185.

[332] *West Africa*, February 23, 1963.

[333] Agreement with regard to the Northern Rhodesia – Angola boundary, signed at Lisbon, on November 18, 1954. *U.N.T.S.* (No. 2841), Vol. 210, p.265; Agreement regarding the Nyasaland-Mozambique frontier, signed at Lisbon, on 18 November, 1954. *U.N.T.S.* (No. 4706), Vol. 325, p.307.

[334] *U.N.T.S.*, (No. 4340), p.263.

[335] Exchange of letters constituting an agreement concerning the adjustment of the frontier on the Danube; Belgrade, 30 November 1963. *U.N.T.S.*, Vol. 513, p.248.

[336] Mostly in cases of international maritime boundaries. See *infra*, Chapter Four, Section 3.

For China, the procedure of direct negotiations is a means of denouncing "unequal treaties". The Chinese seem to be willing, sometimes, to accept old, pre-independence alignments, provided they be re-defined through this procedure. They contest the treaty basis of the alignment rather than the alignment itself.

For example, the Sino-Burmese delimitation treaty of Peking, January 28, 1960[337] provided, *inter alia*, that a Joint Committee would delimit the boundary "along the traditional line". The extreme North-Western sector of the boundary forms part of the "McMahon Line" of 1914 and was accepted by the Chinese without modification in 1960. But not as the "McMahon Line". The agreement does not mention the 1914 proceedings. It is made clear, instead, that the agreement is the result of discussions between a free China and a free Burma, acting in the spirit of the five principles of peaceful co-existence as proclaimed in the preamble to the Sino-Indian agreement on Tibet of 1914 and at the Bandung Conference of 1955. On the whole,

> "the Chinese Communists accepted without modification the greater part of the British created boundary to which the Kuomintaang and the Manchus had been extremely reluctant to accord formal recognition"[338]

The Sino-Russian boundary dispute has its origin in the boundary treaties of Aigun (May 1858), Peking (1860) and St. Petersburg (1881)[339], the validity of which is contested in China as "unequal treaties".

The Chinese attitude to the problem is revealing:

> "Although the old treaties relating to the Sino-Russian boundary were unequal treaties, the Chinese Government is nevertheless willing to accept them and take them as the basis for a reasonable settlement of the Sino-Soviet boundary question. Guided by Proletarian Internationalism and the principles governing relations between Socialist Countries, the Chinese Government will conduct friendly negotiations with the Soviet Government in the spirit of consultation on an equal footing and mutual understanding and accommodation. If the Soviet side takes the same attitude as the Chinese Government, the settlement of the Sino-Soviet boundary question, we believe, ought not be difficult, and the Sino-Soviet boundary will truly become one of lasting friendship"[340].

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[337] *Op.cit.*

[338] See LAMB, *Asian Frontiers*, pp.146-158.

[339] *Ibid.*, pp.190-213.

[340] *Peking Review*. Peking, May 8, 1964.

ii) *Indirect Negotiations*

The procedure of direct negotiations for boundary delimitation is sometimes combined with a different system.

Thus, the General Assembly of the United Nations, while deciding Libya's independence, also recommended a delimitation procedure to be carried through by the parties directly interested. So doing, the Assembly renounced the competence to make appropriate adjustments to the boundaries of the former Italian Colonies with which the four Great Powers had apparently sought to invest it[341].

In the context of the Arab-Israeli conflict, Resolution 242, adopted by the Security Council at its 1382nd meeting on November 22, 1967[342] did not include a procedure for its execution.

Paragraph 3, however

> "requests the Secretary-General to designate a Special Representative to proceed to the Middle-East to establish and maintain such contacts with the states concerned in order to promote agreement and assist efforts to achieve a peaceful and accepted settlement in accordance with the provisions and principles in this resolution"[343].

The exact task of Ambassador Jarring, nominated as the "Special Representative of the Secretary General", is not very clear. The Arabs would rather call him "mediator" while Israel would contend that his task has been conceived first as a transmitter, than as the prompter of negotiation. Whereas Israel insists on direct negotiations, however, the United Arab Republic and the Hachemite Kingdom of Jordan, pursuing their policy of non-recognition towards Israel, would accept only "indirect" negotiations.

This procedure has not frequently been used for boundary delimitation. The establishment of international boundaries presupposes mutual recognition. To accept "indirect" negotiations exclusively, because of a policy of non-recognition, for the purpose of boundary delimitation is, therefore, a self-contradictory policy, which might seriously compromise the prospects for success.

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[341] See PELT, Adrian. *Libyan Independence and the United Nations*. New Haven and London, Yale University Press, 1970; pp.417-428. And see *infra*, Chapter Two, Section 3, B, ii (a).

[342] *S.C.O.R.*, 22nd Year. *S/INF/22/REV.2.*

[343] *Loc. cit.* This agreement must include delimitation of boundaries; see *infra*, Chapter Two, Section 3, B, ii (b).

A case in point relates to delimitation of the Italian-Yugoslav international boundary after World War I.

On May 1919 an attempt was made by American officials to convince the antagonists to reach agreement on the boundary question by this procedure.

> "What followed was a bizarre session in the Colonel's (Colonel House, American Secretary of State) suite at the Crillon, in which Trumbic (Yugoslav) was closeted in one room with Johnson and Frazier, while Orlando and Dr. Cellere (Italians) were in another with Miller and George Louis Beer (the American expert on colonial questions), with House using the middle room as a control center. The meeting – Trumbic and Orlando never came face to face – lasted four hours and resulted in a complete deadlock"[344].

## C. *SUMMARY*

Contemporary practice shows great reliance on the procedure of direct negotiations as the safest device for establishment of international boundaries.

Whereas an examination of post World War II practice shows that direct negotiation is *the* modern, irreplaceable device for delimitation, as almost all delimitations were achieved through it, the question of its normative content arises in hitherto unknown dimensions.

This question, as is demonstrated in Chapter Four below, has recently received some innovative answers in relation to maritime boundaries. As regards international land boundaries it seems clear, nevertheless, that the choice of a procedure for delimitation is, still, purely optional. In the following pages reference is accordingly made to such procedures as involve third parties, whether instituted by the limitrophe states or otherwise.

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[344] LEDERER, Ivo J. *Yugoslavia at the Paris Peace Conference, a study in Frontiermaking.* New Haven and London, Yale University Press, 1963; pp.210-212.

## CHAPTER TWO

## THIRD PARTIES AND DELIMITATION

### *PREFATORY*

This chapter refers to political action of third parties as promoters and operators of delimitation.

The first section relates to procedures instituted by the affected parties and involves, therefore, no questions of competence. It is, indeed, an investigation of the effectiveness and desirability of mediation for delimitation rather than a purely juridical disquisition.

The second section relates to delimitation by what is herein termed "Big Powers", reflects the shortcomings of the "sovereign equality" doctrine, and involves mainly problems of competence.

The third section is a survey of the action of the League of Nations and of the United Nations in the process of boundary-making. It relates more to practice than to rules and thus proposes to elucidate the nature, extent and legal importance of such action.

The fourth section is an examination of the legal character of decisions of political organs. This is especially important in order to differentiate such decisions from delimitation by adjudication.

### SECTION 1. PROCEDURES INSTITUTED BY THE AFFECTED PARTIES

Article 33 does not include the current distinction between "Good-Offices" and "Mediation". The definition of the former term is not juridically exact, but it is usually used in relation to the efforts of a third party to bring two disputants together or to act as a go-between, without trying to suggest a solution to the dispute in question. It thus consists in various kinds of action tending to call negotiation between conflicting states into existence, while mediation consists in direct conduct of negotiations between the parties at issue on the basis of proposals made by the mediator, and implies an attempt by the third party to *resolve* a dispute[1].

Good-Offices is a procedure generally used to start a process of conciliation between disputant limitrophe states. Recently, this function

[1] *Cf.* Hague Conventions for Pacific Settlement, Articles 2-8.

has been filled by a representative of the Secretary-General of the U.N., who took the first steps in resolving the frontier dispute between Cambodia and Thailand in the late fifties; as a result of his efforts, diplomatic relations between the two countries were restored, and subsequently the matter was submitted to the I.C.J.

Mediation involves a request by both parties to a third party to assist them in resolving their problems. It does not invove any commitment in advance to accept the recommendations of the mediatory power, and in this it differs from arbitration and judicial settlement.

One other political procedure mention in Article 33 is "Conciliation". This relates to cases where the parties have referred the dispute to a body of persons primarily for the purpose of an impartial ascertainment of the facts and a suggestion of the appropriate lines of a settlement[2].

As a matter of fact, the existence of the foregoing procedures operates as an indirect pressure on disputants and has often helped to bring about a settlement[3]. As "conciliation", however, is a rather infrequently resorted-to procedure in the context of the decisive phase of boundary-making and as, on the other hand, the Charter of the United Nations makes no distinction between "Mediation" and "Good-Offices" the discussion herein was entitled "Mediation". In the descriptive part, however, it always tried to distinguish between these procedures as far as this was feasible; for the distinction, in the reality of international life, is sometimes difficult to draw, as each case has its own peculiarities[4]. Indeed, the purpose at present is not really to inquire into modalities of settlement in specific cases but, rather, to convey a general comprehension of the function and efficiency of political action by third parties in promoting settlement of boundary problems.

## A. *MEDIATION*

### i) *Mediation before World War II*

The procedure of mediation[5] has been useful, in the context of

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[2] OPPENHEIM, *International Law*, vol. 2, 7th ed., p. 13.

[3] CUKWURAH, p. 152.

[4] YOUNG, Oran B. *The Intermediaries: Third Parties in International Crises*. New Jersey, Princeton University Press, 1967.

[5] See MEYNAUD, Jean and SHROEDER, Brigitte. *La Médiation: tendances de la recherche et bibliographie* (1945-1959). Amsterdam, North Atlantic Publishing Company, 1961; DARWIN, H.G. "Mediation and Good-Offices". David Davis Memorial Institute of International Studies, *Report of a Study Group on the Peaceful Settlement of International Disputes*. London, 1966.

boundary delimitation, especially in providing methods for settlement of boundary disputes. Thus, it has been quite frequently used in relation to Latin America's often contested boundaries. Several boundary agreements have, in fact, been brought about through mediation, in most cases of the United States.

> "The mediation of the United States has always been placed on a high place and tempered with practicality. It has tried to cast oil on troubled waters, to restrain war-like preparations, to induce direct negotiations and, in the last resort, to suggest, if not demand, arbitration"[6].

In Central America, where the United States was more active than in other parts of Latin America, mediation was exercised in relation to Guatemala's boundaries with Honduras[7] and Mexico[8]. In the case of the Guatemala-Mexico boundary mediation[9] led both contending states to agree at New York, on August 12, 1882, upon preliminary bases for a settlement[10] preceding a delimitation Treaty, signed at Mexico-City on September 27, 1882[11].

In relation to the Guatemala-Honduras boundary dispute United States' mediation led to adoption by the parties of a boundary Arbitration Treaty[12]. This provided for settlement by arbitration before the International Central American Tribunal, created by the Washington Convention of February 7, 1923. The Tribunal's award, handed down on January 23, 1933[13] duly delimited the entire boundary.

In this latter case the United States has already tried to promote agreement between the parties in 1918. In fact, both states, in November, 1917, accepted an American invitation to send representatives to Washington to discuss the issue. On May 20, 1918, a boundary conference opened at Washington, with Boaz Long, United States' Minister to Salvador, acting

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[6] See WOOLSLEY, L.J. "Boundary Disputes in South America". *A.J.I.L.*, Vol. 25 (1939), p. 324.

[7] See IRELAND, *Boundaries, Possessions and Conflicts in Central and North America and the Carribean*. pp. 69-94.

[8] *Ibid.*, pp. 94-111.

[9] See Boundary between Mexico and Guatemala, *House Executive Documents*, Series 154, 48th Congress, 1st Session (Washington, May 6, 1884), Vol. XXVII, Series 2207.

[10] *U.S. For Rel.*, 1882, pp. 437-441; *B.F.S.P.*, Vol. 73, p. 272.

[11] *U.S. For. Rel.*, 1882, pp. 648-651; 73 *B.F.S.P.*, p. 273; MARTENS, *N.R.G.*, 2 e. sér., Vol. 13 (1888), p. 670.

[12] See *B.F.S.P.*, Vol. 132, p. 823; MARTENS, *N.R.G.*, 3e. sér., Vol. 31 (1930), p. 365.

[13] *L.N.T.S.*, 1933, p. 620; FISHER, F.C. *"Arbitration of the Guatemala-Honduran Boundary Dispute"*. *A.J.I.L.*, Vol. 27 (1933), pp. 403-427.

for the mediator, Secretary of State Robert Lansing. The Mediator asked the parties to agree on a common boundary alignment, which they failed to do. Meetings were then suspended. Further agreements for mediation by the U.S.Department of State were sought unsuccessfully in April 1928[14].

Only when the State Department proposed, thereafter, that the question be submitted to arbitration and invited delegations of both contending States to Washington on October 25, 1929, to discuss means for adjusting the dispute did the delegates, presided by a subsidiary secretary of the U.S. Department of State, come to the general agreement for arbitration, which finally led to the boundary's delimitation.

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In South America, United States' mediation, through its Ministers at Buenos Aires and at Santiago[15] led Argentina and Chile to sign the delimitation treaty of Buenos Aires, July 23, 1881[16]. The alignment provided by this treaty was, in parts, equivocal, because of an ambiguous description. This resulted in further contention[17].

Following a conflict arising from a cession treaty[18] between Chile and Peru[19], good offices tendered by President Herbert Hoover of the United States, in the form of a proposal of final bases for settlement[20] on May 14, 1929[21] and negotiations forwarded by two United States Ambassadors[22], led to a delimitation treaty, signed at Lima, on June 3, 1929[23]. This divided the disputed territory of Tacna and Arica by fixing a boundary through its center.

Widely conflicting territorial claims of Brazil, Colombia and Peru

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[14] *A.J.I.L.*, Vol. 25 (1931), p. 326.

[15] See *U.S. For Rel.*, 1881, pp. 6-18, 130-131, 134-135.

[16] *B.F.S.P.*, Vol. 72, pp. 1103-1105; MARTENS, *N.R.G.*, 2e. Sér., Vol. 12, pp. 491-494.

[17] Article I provided that the boundary was from North to South of the 52nd Parallel the Cordillera of the Andes, the frontier line to run by the most lofty peaks of the said chains which divide the waters. This provision proved impossible to fulfill when it was found that the highest ridge was not in all places the watershed, with Argentina claiming to the line of the highest peaks and Chile insisting that the line should follow the watershed and neither willing to yield. See BOGGS, *International Boundaries*, pp. 85-92.

[18] See IRELAND, *op. cit.*, pp. 160-175.

[19] Treaty of Ancon, October 20, 1883. *B.F.S.P.*, Vol. 74, pp. 349-353; MARTENS, *N.R.G.*, 2e. Sér., Vol. 10, pp. 191-195.

[20] See *U.S. For Rel.*, 1929, Vol. I, pp. 798/9.

[21] See WOOLSLEY, "The Tacna-Arica Settlement". *A.J.I.L.*, Vol. 23 (1929), p. 605.

[22] *U.S. For. Rel.*, 1929, Vol. I, pp. 720-818.

[23] *L.N.T.S.*, Vol. XCIV, pp. 402-411.

caused a triangular dispute between these States, a dispute composed by United States' good-offices.

The dispute arose after Peru and Colombia settled their boundary along the north side of the "Oriente" territory, lying east of the Andes on the headwaters of the Amazon[24]. On learning of this treaty, Brazil made formal observations to Peru, that the parties to the treaty were attempting to deal in part with territory which Brazil claimed against Peru and had never settled with Colombia[25]. The protest caused a deadlock between Peru and Colombia on the boundary question, and the former state asked the United States to see what could be done to appease Brazil.

Secretary of State Charles E. Hughes conducted complicated negotiations[26], and as a result of his informal suggestions a protocol was signed in Washington on March 4, 1925[27] by all four States. This provided that Brazil would withdraw its observations regarding the 1922 Colombia-Peru treaty; that the ratifications of this treaty by both states should proceed, and that, consequently, Colombia and Brazil should sign a treaty establishing their boundary along a new frontier (between the mouth of the Appaporis river and the village of Tabatinga). Ratifications of the Colombia-Peru treaty of 1929 were exchanged at Bogota on March 1928, and pursuant to the Hughes agreement a delimitation treaty was signed between Brazil and Colombia at Rio de Janeiro on November 15, 1928[28].

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Though most successful mediation endeavours in Latin America were accomplished by the United States, some of its attempts failed, and other forms of action were required.

In relation to the boundary dispute between Costa Rica and Panama,[29] United States' mediation was sought by both States – after some pressure exerted to this effect by the U.S. Secretary of State in February, 1909[30] – on the issue of the validity of an aribtral award, handed down by President Emile Loubet of France, on September 11, 1900[31], which defined the boundary between the two States.

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[24] *Ibid.*, Vol. LXXIV, pp. 10-17 (No. 1726).

[25] See WOOLSLEY, *A.J.I.L.*, Vol. 25 (1931), p. 331.

[26] See *U.S. For. Rel.*, 1925, Vol. 1, pp. 431-463.

[27] *U.S. Treaty Information Bulletin*, Vol. 4 (1930), p. 4; MARTENS, *N.R.G.*, 3e. Sér., Vol. 25, pp. 672-674.

[28] MARTENS, *N.R.G.*, 3e. Sér., Vol. 25, pp. 674-677.

[29] See IRELAND, *Boundaries, Possessions and Conflicts in Central and North America and the Carribean*, pp. 30-42.

[30] *U.S. For. Rel.*, 1910, pp. 772-822.

[31] 92 *B.F.S.P.*, 1038; MARTENS, *N.R.G.*, 2e. Sér., Vol. 32, (1905), p. 411.

On February 1, and 2, 1910[32], the U.S. Secretary of State telegraphed both antagonists that there was no intention on the part of his government to limit the issue to the mere interpretation of the award, but that it thought that both contending governments should submit to arbitration the delimitation of their boundary in the disputed territory. He further asked both governments to give their special envoys in Washington full power to negotiate an arbitration protocol on this issue.

These envoys conferred, in the presence of three officials of the U.S. Department of State, in Washington on February 14, 1910 and on March 1, 1910, held a further conference with Secretary Knox. On the basis of the latter's suggestions[33] the Ministers signed an Arbitration Convention in Washington, on March 17, 1910[34].

The arbitral award, handed down on September 12, 1914[35] was, however, rejected by Panama on October 17, 1914[36]. Subsequent efforts of the United States to mediate failed, and a new boundary treaty signed at San José on September 26, 1938, concluded through United States' mediation, failed of ratification.

A somewhat similar affair occurred in relation to the boundary between Honduras and Nicaragua.

The award of the King of Spain of December 23, 1906, which fixed the boundary between these two States[37] was not executed by them, Nicaragua declaring it null and void. Honduras, therefore, on October 11, 1913[38], asked the good offices of the United States in securing the award's execution.

By telegram of August 21, 1918[39] the United States offered its good offices to secure an amicable adjustment, and invited each state to send to Washington a representative to familiarize the State Department with the question in informal conferences; not for a new arbitration but for an amicable discussion of the whole matter. Both States accepted on this basis, but this resulted in no substantial agreement[40].

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[32] *U.S. For. Rel.*, 1910, p. 804.

[33] *U.S. For. Rel.*, 1910, p. 810.

[34] *A.J.I.L.*, Vol. 6 (1912), Supplement, p. 1; *B.F.S.P.*, Vol. 103, p. 404; MARTENS, *N.R.G.*, 3e. Sér., Vol. 5 (1912), p. 678; *R.G.D.I.P.*, Vol. 17 (1910), p. 407.

[35] *A.J.I.L.*, Vol. 8 (1914), p. 913; *B.F.S.P.*, Vol. 108, p. 439.

[36] *U.S. For. Rel.*, 1914, pp. 993-1028; *ibid.*, 1915, pp. 1131-1155.

[37] *B.F.S.P.*, Vol. 100, p. 1906; MARTENS, *N.R.G.*, 2e. Sér., Vol. 35 (1908), p. 563.

[38] *U.S. For. Rel.*, 1918, pp. 11-20.

[39] *Ibid.*, pp. 20-34.

[40] See IRELAND, *op. cit.*, pp. 141-142.

After joint mediation by Costa Rica, Venezuela, and the United States, a Conference at San José during November 1937[41] succeeded in securing the signature there on December 10, 1937 of a pact of mutual offers suggested by the mediation commission, which proposed, *inter alia*, "to solve the present conflict by pacific means as established by international law". But this also failed to produce tangible results as the pact was never concretely applied[42].

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The procedure of a group mediatory conference in which disputants sit down with the mediators to discuss questions, resorted to in the Honduras-Nicaragua case, had a successful precedent in settlement of the Chaco dispute between Bolivia and Paraguay[43].

Attempts at settlement of this dispute were unsuccessfully made by the League of Nations as well as by American organs and individual American states[44]. Bolivia and Paraguay were, however, persuaded by an American Mediation Commission of the adjacent neutrals (together with Uruguay and the United States)[45] to join a Protocol of June 12, 1935[46]. This provided for the assembly of a peace conference to promote the settlement by direct negotiations of the parties in conference with the neutrals of all matters in dispute or (Article 3), in case of failure, by submission of the dispute for judicial arbitration to the Permanent Court of International Justice.

On November 1, 1935, the peace conference formally declared that the war between Bolivia and Paraguay had terminated. But it had been unable to make any progress towards a definitive solution of the boundary question.

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[41] *U.S. Treaty Information Bulletin*, October 1937, No. 4; *ibid.*, December 1937, No. 99, 10; *ibid.*, June 1938, No. 105, 162.

[42] See case concerning the Arbitral Award made by the King of Spain on 23 December 1906. Judgement of 18 November, 1960. *I.C.J. Reports*, 1960, pp.192-239, at p.203.

[43] See WOOLSLEY, L.H., "The Settlement of the Chaco Dispute" *A.J.I.L.*, Vol. 33 (1939), pp. 126-129.

[44] See IRELAND, *Boundaries, Possessions and Conflicts in South America.*, pp.66-95; WOOLSLEY, "The Chaco dispute". *A.J.I.L.*, Vol. 26 (1932), pp.796-801; *ibid.*, *A.J.I.L.*, Vol. 28 (1934), pp. 724-729.

[45] See *U.S. For. Rel.*, 1935, Vol. IV, pp.46-77.

[46] See IRELAND, *op.cit.*, p.89; MARTENS., *N.R.G.*, 3e.Sér., Vol.36 (1939), pp.684-688.

On May 27, 1938, after almost three years of negotiations[47], the Chaco peace conference proposed to the antagonists a new boundary. The President of the United States and the heads of other states urged them to accept the proposed solution[48], but they found it impossible to do so.

Finally, on July 21, 1938, the representatives of both states were brought to sign a treaty of peace and boundaries, which was duly ratified[49]. Under the terms of this treaty Bolivia and Paraguay submitted the settlement of the Chaco boundary to arbitration by the Chaco Arbitral College, composed of the Presidents of the six mediatory nations, who were empowered either directly or indirectly to fix the boundary, *ex aequo et bono* (Article 2), within certain narrow zones defined in the treaty. The arbitral award was rendered on October 10, 1938, fixing the boundary within the prescribed zones[50].

The procedure of the Chaco Peace Conference was different from that resorted to in most mediation cases, and entirely free from any element of compulsion (no report, findings or decisions were rendered by the mediators to the attention of the disputants, there was only an effort to reach accord). It amply proved itself, in this complicated case, very well suited for settlement of boundary disputes.

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The last successful mediation attempt in Latin America before World War II relates to the Ecuador-Peru disputed boundary[51]

After the outbreak of hostilities between the two states on July, 1941, mediation was offered by the United States, Brazil and Argentina and accepted by the antagonists[52]. At the conference of western

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[47] See *U.S. For. Rel.*, 1935, Vol. IV, pp.91-197; *ibid.*, 1936, Vol. V, pp.35-105; *ibid*, 1937, Vol. V, pp 4-46; *ibid.*, 1938, Vol. V., pp.89-178; *The Chaco Peace Conference. Report of the Delegation of the United States of America to the Peace Conference Held at Buenos Aires, July 1, 1935 — January 23, 1939* Washington, Government Printing Office, 1940.

[48] *U.S. For. Rel.*, 1938, Vol. V, pp. 126/7.

[49] See MARTENS, *N.R.G.*, 3e. Sér., Vol. 36 (1939), pp.692-695.

[50] *U.N.R.I.A.A.*, Vol. III, pp.1822-1825.

[51] See WOOLSLEY, L.H. "The Ecuador-Peru Boundary Controversy", *A.J.I.L.*, Vol. 31 (1927), p.97; MAIER, George. "The Boundary Dispute between Ecuador and Peru". *A.J.I.L.*, Vol. 63 (1969), pp.28-46.

[52] *U.S. For. Rel.*, 1941, Vol. VI, pp.212-253.

hemisphere Foreign Ministers which met at Rio de Janeiro in January 1942[53] a "Protocol of Peace, Friendship and Boundaries"[54] was signed by the Foreign Ministers of Ecuador, Peru, the United States, Brazil, Argentina and Chile.

This Protocol was thereafter duly ratified. Its validity, however, has, since 1951, been contested by Ecuador, whereas the Peruvians maintain that it:

> "constitutes a valid, current and binding international treaty which is further guaranteed not only by Argentina, Chile and Brazil, but also by the United States. These four powers upheld the treaty as they consider it is fully within the terms of international law and that it furthermore records the legitimate aspirations and the historic titles of both Peru and Ecuador"[55].

ii) *Mediation since World War II*

Post-war mediation cases have been very rare, usually related to uninhabited, remote frontier areas and confined to preventive measures. Indeed, as was demonstrated in the preceding chapter, almost all delimitations during this period have been operated through direct negotiations.

A case in point relates to delimitation of the Indo-Pakistani boundary in the Rann of Kutch, a vast marshy area lying between the states of Kutch and Sind[56].

When India attained independence in August 1947 the state of Kutch became part of it, and that of Sind became part of Pakistan. India and Pakistan thus inherited an undelimited frontier area. From July 1948 onwards, diplomatic notes were exchanged between the two governments concerning the boundary between them in the area[57].

Following a clash between Indian troops and Pakistani police in the Rann of Kutch and a series of incidents on the Punjab border, it was agreed in 1956 to demarcate the boundary between the two countries.

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[53] *U.S. For. Rel.*, 1942, Vol. V, pp.6-47, 268.

[54] See *A.J.I.L.*, Vol. 36 (1942), Supplement, p.268.

[55] *The Washington Post*, January 26, 1967.

[56] See SCHWEISOW, Naomi. Mediation. In *The International Regulation of Frontier Disputes. Op.cit.*, pp.156-160.

[57] See Indian Society of International Law. *The Kutch-Sind Border Question: A Collection of Documents and Comments.* New Delhi, 1965.

But although agreement was reached on the Punjab–West Pakistani boundary, the Kutch–Sind boundary dispute remained unsettled[58]. The dispute sparked off an armed clash in April 1965.

Through the mediation of the British, informal talks on the dispute took place in London during the Commonwealth Prime Ministers' Conference on June 17-25, 1965[59]. Therein, on June 30, 1965, Lall Bahdur Shastri and President Ayub Khan (with Mr. Wilson acting as an intermediary) signed an agreement which ended the hostilities, provided for talks between the two countries at ministerial level and envisaged the constitution of an Arbitral Tribunal "for the determination and demarcation of the border" if no agreement was reached[60]. At the Indian Government's suggestion the proposed ministerial talks were cancelled on August 18, and it was agreed to refer the question at once to a Tribunal. The Tribunal's award, describing the alignment of the boundary, was rendered on February 19, 1968[61].

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Important oil interests complicated delimitation of boundaries in the eastern part of the Arabian Peninsula, south of the Persian Gulf, where disagreement persists about boundaries between Saudi Arabia and some Trucial States[62].

The dispute centers on interpretation of some delimitation treaties, contracted in the second decade of the present century between the Ottoman and British Governments[63]. The Ottoman Empire, at the time, controlled Najdi territory.

Ibn Saud succeeded to Ottoman sovereignty in Najd and Hasa in 1932. In 1933 he granted a petroleum concession to the Standard Oil Company of California. The concessionary area was to be "the Eastern portion of our Saudi Arabi Kingdom, within its frontiers".

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[58] See CHACKO, C.J. "The Rann of Kutch and International Law". *Indian Journal of International Law*, Vol. 5 (April 1965), pp.147-175.

[59] See *Keesing's Contemporary Archives*. Vol. 15 (1965-1966), p.20841.

[60] See *ibid*., pp.20927-20929; RAO, Chandersakera P. "Indo-Pakistan Agreement on the Rann of Kutch: Form and Content". *Indian Journal of International Law*, Vol.5 (April 1965), pp.176-185.

[61] See *Indo-Pakistan Western Boundary Case Tribunal: Award*, 19 February, printed by the Manager, Government of India Press, Faridabad, 1968; RAHAMATULLAH KHAN. "Relinquishment of title to territory. The Rann of Kutch Award – A case study". *Indian Journal of International Law*, Vol.9 (April 1969), pp.159-176; RAMA RAO, T.S. "An Appraisal of the Kutch Award". *Ibid*., pp.143-157.

[62] See KELLY, J.B. *Eastern Arabian Frontiers*. London, Faber and Faber, 1964.

The United States' Embassy in London was informed on April 24, 1934, by the British Foreign Office that the Eastern frontier of the Kingdom of Saudi Arabia was the alignment of the Anglo-Turkish Conventions of 1913-14, and that Ibn Saud had succeeded to Ottoman Sovereignty to the West and North West of this line[64]. On April 28, 1934, the British Minister at Jeddah informed the Saudi Government of the contents of that communication[65].

The Saudi Government protested that it was not bound by the 1913-14 conventions[66] and proclaimed a new boundary reaching much further eastward than the 1914 line. On October 14, 1949, it presented another claimed alignment[67].

This new claim was totally rejected by the British, who informed the Saudi Government, in a note dated November 30, 1949[68] that Britain was left with no option but to stand upon her legal rights under the Anglo-Turkish Conventions. They argued that at the time these were contracted, Ibn Saud had been a British Subject and was, therefore, bound by the conventions. No basis for discussion of the difficulties could thus be agreed upon.

On the brink of imminent armed clash, the American Ambassador in Saudi Arabia intervened, and succeeded to induce the antagonists to sign a standstill agreement, providing also for resumption of direct negotiations[69]. Negotiations during 1953 and 1954 established an agreement on terms for arbitration of the dispute.

The agreement, signed at Jeddah on July 30, 1954[70] provided, *inter alia*, that the Tribunal should decide the location of the boundary between Abu-Dahbi and Saudi Arabia within specified zones, carefully defined therein[71].

Arbitration proceedings, however, were broken off on October, 1955, following the resignation of the British member of the Tribunal[72]. American mediation, thus, finally led to no resolution of the substantial issues involved in the dispute, and to no delimitation of boundaries.

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[63] Convention of July 29, 1913. See TEMPERLEY, *British Documents*, Vol. 10, pp.190-4; Convention of June 5, 1914. *Ibid.*, p.341.

[64] *Foreign Office Records*. E 2481/279/91. Rendell, G.W., to Millard, April 24, 1934, in *Arbitration Concerning Buraimi and the Common Frontier between Abu Dahbi and Saudi Arabia: Memorial Submitted by the Government of the United Kingdom of Great Britian and Northern Ireland, 1955*. II, Annex D, No.3.

[65] See *ibid.*, No.4.

[66] *Ibid.*, No. 5, 7. 192.

[67] See *ibid.*, No.26.

[68] See *ibid.*, No.27.

[69] See SCHWIESOW, *op.cit.*, pp.144-150.

[70] *Cmd.* 9272, *British Treaty Series* No.65 (1954).

[71] *Loc.cit.*

The United Nations has tried to perform some accommodating role in boundary disputes. It has hardly been successful in its efforts, however. It seems that states prefer action of regional organization for this matter.

Thus, the boundary dispute between Somalia and Ethiopia – which has its origin in the 1897 delimitation treaty between Great Britian and Ethiopia[73] and its cause in the conflict between the nomadic tradition of the Somalis and the fixed boundaries, based on colonial *status quo* policy of the majority of African states[74] – was a case the United Nations dealt with, without concrete results, ever since Somalia's independence.

In 1954, the Organization urged direct negotiations for a solution. Results were not forthcoming, and in 1957 the General Assembly recommended arbitration[75]. Agreement was reached in 1958 over the arbitration Tribunal itself, but there was no agreement on the *compromis d'arbitrage*[76].

On February 9, 1964, U Thant sent a message to both governments, appealing to them to do anything in their power to settle their dispute peacefully. But the Somali government called on February 11, 1964 for the inclusion of the dispute in the agenda of the O.A.U., which discussed it at its Dar es Salaam, Lagos and Cairo meetings and passed resolutions calling upon the parties to settle their dispute peacefully, again quite fruitlessly[77].

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Somalia's boundary problems with another neighbouring state – Kenya – caused another dispute which the O.A.U. tried to settle.

During the meetings of the Fifth Assembly of Heads of State and Government of the Organization, held at Kinshasa (Congo) on September 11-14, 1967, the rival governments signed an agreement to stop shooting and start talking[78].

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[72] *The Times*, London, September 17, 1955; *ibid.*, October 5, 1955.

[73] *I.C.L.Q.*, Vol.5, pp.249-250; PAYNE, R.H. "Divided Tribes: A Discussion of African Boundary Problems". *New York University Journal of International Law and Politics*. Vol. 2 (1969), p.243, at pp.255-262.

[74] See TOUVAL, Saadia. "Africa's Frontiers, Reactions to a Colonial Legacy". *International Affairs*. Oxford University Press. Vol.42 (1966), p.641.

[75] General Assembly Resolution 1213 (XII). 12 *G.A.O.R.* (1957), Annexes, Agenda Item No.39, at pp.16-17.

[76] 13 *G.A.O.R.*, Annexes, Agenda Item No.40, *Passim* (1958); 14 *G.A.O.R.*, Annexes, Agenda Item No.40, *Passim* (1959).

[77] See *Keesing's Contemporary Archives*, Vol.14 (1964), pp.19432, 20176, 20253.

[78] *Ibid.*, Vol.16 (1967-8), p.22281.

In implementation of this agreement the President of Kenya and the Prime Minister of Somalia, meeting under the auspices of the O.A.U., with President Kaunda of Zambia acting as mediator, agreed to end fighting, restore normal relations, and to establish a Committee comprising representatives of Kenya, Somalia and Zambia, to supervise the implementation of this agreement and to seek satisfactory solutions of the differences between Kenya and Somalia[79].

## B. *REGIONAL ARRANGEMENT*

Article 33 of the United Nation's Charter calls upon "the parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security" to seek a solution, *inter alia*, by "resort to regional agencies or arrangements".

The League of Nations, and the United Nations, did not claim exclusivity for the maintenance of peace. For just as the Covenant in Article 21 authorized the members of the League to enter "regional understanding" "for securing the maintenance of peace", the Charter permits in Article 52 "regional arrangements" for dealing with matters "relating to the maintenance of International peace and Security". The states members of the U.N. are thus authorized by the Charter to establish regional organizations. Some such organizations have been constituted since 1945[80].

The Charter of the United Nations specifically recognizes pacific settlement of disputes as a matter appropriate for regional action[81]. But the number of boundary disputes settled through such action is quite meagre. Although states prefer regional action to United Nations action in such matters, they seem to be unwilling to entrust any international (or supra-national) organ with the task of delimitation. Indeed, the competence to perform this is considered directly emanating from territorial

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[79] *Ibid.*, p.22386.

[80] See LAWSON, Ruth C. *International Regional Organizations: Constitutional Foundations*. New York. F.A. Praeger, 1962.

[81] Article 52, Paragraphs 2 and 3:

"2. The Members of the United Nations entering into such arrangements or constituting such agencies shall make every effort to achieve pacific settlement of local disputes through such regional agencies before referring them to the Security Council.

3. The Security Council shall encourage the development of pacific settlement of local disputes through such regional arrangements of by such regional agencies either on the invitation of the states concerned or by reference from the Security Council".

sovereignty. Notwithstanding the clear stipulation of paragraph 2 of Article 52, according to which the members of the United Nations which are members of a regional organization "shall"; i.e., are obliged to "make every effort to achieve pacific settlement of local disputes" through their regional organization. The action of regional organizations in boundary disputes has, thus, been confined to preventive measures, while delimitation was operated by the parties directly concerned[82].

A case in point is the Algerian-Moroccan boundary dispute[83]. This dispute was the first test case for the newly formed Organization of African Unity (OAU)[84].

The matter at issue in the dispute was original delimitation of the boundary between the two states[85].

The Moroccan government concluded, in July, 1961, a secret agreement with the provisional government of the Algerian Republic. This stated that

> "the territorial problem created by the delimitation imposed arbitrarily by France will be resolved through negotiations between the Kingdom of Morocco and the Government of Independent Algeria"[86]

But Algeria's accession to independence, in July, 1962, was immediately followed by armed clashes.

After the failure of cease-fire negotiations between the antagonists in mid-October, 1963, the Moroccan government indicated its desire to submit the dispute to the United Nations[87], while the Algerian government requested an extraordinary meeting of the OAU Council of Ministers to be convened in order to effect an "African settlement of the dispute"[88].

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[82] See LYON, Peter. Regional Organization and Frontier Disputes, in *The International Regulation of Frontier Disputes, op.cit.*, pp.109-140.

[83] See WILD, Patricia B. "The Organization of African Unity and the Algerian Moroccan boundary Conflict: A Study of New Machinery for peacekeeping and for the peaceful settlement of disputes among African States". *International Conciliation*. Vol.20 (1966), pp.18-36; TROUT, Frank E. *Morocco's Saharan Frontiers* Geneva, Droz, 1969.

[84] See BOUTROS-GHALI, B. "The Addis-Ababa Charter". *International Conciliation*, January 1964, No.546.

[85] See ZARTMAN, William. "The Sahara – Bridge or Barrier?". *International Conciliation*. January 1963 (No.541), p.48.

[86] *Le Monde*. October 23, 1963, p 2; Permanent Mission of Morocco to the United Nations, *Texte du Protocole d'accord Morocco-Algérien du 6 juillet 1961 relatif au problème territorial.* New York, October 20, 1963.

[87] *Le Monde, loc.cit.*

[88] *The Guardian*, October 31, 1963, p.1; *The Times*, London, October 31, 1963, p.12.

A cease fire was finally arranged after a meeting at Bamako, Mali[89]. Emperor Heile Selasie of Ethiopia and President Modibo Keita of Mali there induced President Ben Bella of Algeria and King Hassan of Morocco to adopt a decision to "request for an extraordinary meeting of the OAU Council of Ministers, for the purpose of creating a Committee of Arbitration to effect a definitive solution of the Algerian-Moroccan boundary dispute. . ."[90].

An extraordinary session of the OAU Council of Ministers was thereafter held at Addis-Ababa on November 15-18, 1963[91], officially convoked by the Organization on November 11[92] by virtue of Article XII (2) of the OAU Charter[93]. The disputants' Foreign Ministers presented their cases before the Council, which began discussions on November 15, 1964[94].

In its final resolution, the extraordinary session decided to appoint a Special *Ad Hoc* Arbitration Commission to effect a definite settlement of the boundary dispute by submitting concrete proposals for settlement to the disputant states[95].

This task was thereafter undertaken by a Seven Nation Commission of Arbitration and Conciliation[96]. This special commission held several meetings[97], but it failed to effect a legal settlement of the boundary dispute.

On February 2, 1964, President Ben Bella announced that the antagonists had reached agreement to end their boundary dispute[98]. Actually agreements were concluded between both governments on February 20, 1964[99] and May 1965[100], which generally improved their relations, though not affixing any boundary. The antagonists thus indicated their preference for direct bilateral negotiations rather than for solutions of a supranational organ.

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[89] *Le Monde*, October 30, 1963, p.2.

[90] See "Bamako Communiqué" in Algerian Ministry of National Orientation, *De Bamako à Addis-Ababa*. Algiers, March 1964; p.29.

[91] BOUTROS-GHALI, *op.cit.*, p.42.

[92] *The Maghreb Digest*, January 1964, Vol.2, No.1, p.28.

[93] BOUTROS-GHALI, *op.cit.* p.42.

[94] *The Maghreb Digest. op.cit.*, p.29; *De Bamako à Addis-Ababa, op.cit.*, pp.39-41.

[95] *Ibid.*, pp.44,45; by Article 19 of the OAU Charter "member states . . . decide . . . to establish a Commission of Mediation, Conciliation, and Arbitration". This, however, is not a judicial organ nor does it have any powers of sanction.

[96] *West Africa*, No.2425, November 23, 1963, p.1323.

[97] *Ibid.*, No.2435, February 1, 1964, p.123.

[98] *The Guardian*, February 21, 1964, p.13.

[99] *The Maghreb Digest, op.cit.*, pp.30-31.

[100] *Le Monde*, May 14, 1965.

At the 6th Assembly of the OAU, which met in Algiers on September, 1968, the two heads of the disputant states had, therefore, agreed not to lay the dispute before the Assembly[101].

Consequently, King Hassan of Morocco and President Boumedienne of Algeria agreed, at a meeting on May 27, 1970, on the principles of a settlement of the boundary dispute. They agreed to set up a Joint Commission to demarcate the boundary in the disputed area, it being expected that the definitive alignment should follow the *de facto* boundary inherited from the French[101].

On June 15, 1972 – during the Tenth Assembly of Heads of States and Government of OAU members, which took place in Rabat, Morocco – King Hassan and President Boumedienne signed a boundary agreement confirming that the Tindouf area would remain part of Algeria[103].

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Summing up, the reluctance of states to entrust the task of delimitation of their international boundaries to third parties is evident, especially when post-World War II practice is reviewed. The general trend is clearly towards complete exclusion of the matter from any but the adjacent states' treatment.

As the foregoing perusal demonstrates, the substance of the achievements of mediation, good-offices, regional arrangements and similar political procedures involving some form of indirect pressure on the parties was mainly limited to forestalling or bringing an end to war and, eventually, submitting a case to arbitration. But such action seldom directly settled boundary disputes. Indeed, one must expect that such action will often fall short of a fundamental resolution of substantial questions involved in boundary disputes, although these procedures may seem attractive to the parties due to their flexibility. In this context, mediation – which involves no obligation on the part of either party to accept recommendations, and which is not necessarily based on legal grounds, thereby enabling a mediator to assess precisely the vital interests of each of the parties and devise a satisfactory compromise – may seem especially suitable. As we saw above, however, in only one contemporary case, an exceptional one at that, did it lead to a final determination of questions at issue. For the long-term task, then, legal procedures might prove more useful.

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[101] See *Keesing's Contemporary Archives*, Vol. 14 (1963-4) pp. 19939-19942; *ibid.*, Vol. 16, p. 22991.
[102] See *ibid.*, Vol. 17 (1969-70) p. 24125.
[103] *Ibid.*, Vol. 18 (1971-72), p. 25372.

## SECTION 2: BIG POWERS AND DELIMITATION

### A. *THE EUROPEAN CONCERT*

In the preceding pages it was demonstrated that the accommodating role of third parties in boundary disputes has been diminishing since the close of the Second World War. This fact undoubtedly has its cause in contemporary political phenomena, the investigation of which is a task falling beyond the scope of this study.

Political action of third parties, and of "Big Powers" in particular, in the matter of boundary delimitation is, however, an ancient fact; during the 19th century the European Concert practiced, almost at will, the functions of a delimitating organ when the boundaries of small, especially newly formed states were concerned.

This role of the Big Powers notably appeared in a particularly characteristic form in connection with the Balkan turmoil; for the relations between the Ottoman Empire and its successor states were matters *par excellence* suited for big power intervention. The Porte, although never an accepted member of the concert, was sometimes party to such delimitation action, whereas the newly formed political entities were not.

Thus, the Convention relative to the Sovereignty of Greece, signed at London on May 7, 1832, by Great Britain, France and Russia[104], which definitely secured Greek Independence, left the Greek boundaries to be settled by negotiations of the three signatory powers with the Ottoman Empire (Article V).

The Treaty of Berlin, July 13, 1878[105], signed by Great Britain, Austria-Hungary, France, Germany, Italy, Russia and Turkey at the last Great Power gathering in the "old diplomacy" style – the Berlin Congress– fixed the boundaries of a new political entity, the vassal Principality of Bulgaria[106] and modified the boundaries of states which thereupon became independent and formerly were under Turkish "suzerainty": Serbia[107], Rumania[108] and Montenegro[109]. Bulgaria was neither represented nor

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[104] *B.F.S.P.*, Vol. 19, p. 33.

[105] *B.F.S.P.*, Vol. 72, p. 382; MARTENS, *N.R.G.*, 2e. Sér., Vol. 3 (1879), p. 449.

[106] Articles I, II.

[107] Articles XXXIV, XXXVI.

[108] Articles XLIII, XLV, XLVI.

[109] Articles XXVI, XXVIII.

heard at the Congress. Serbia, Rumania and Montenegro were not admitted to it, though they could state their claims therein[110]. All four entities were not signatories of the Treaty which dealt almost exclusively with their fate.

The Big Powers thus emphatically affirmed their decision-making role. This role appeared again when a new state was created after the Balkan wars – Albania.

At the termination of the first Balkan War, in 1912, the Great Powers agreed in principle on the creation of an independent Albanian state[111]. The signing of the Armistice on December 3, 1912, between Bulgaria, Serbia and Montenegro on the one side, and Turkey on the other was followed by convocation of a Conference of Ambassadors, which opened its meetings in London on December 18[112].

The Big Powers, assembled in the Conference, had not yet completely settled the question of the Albania boundaries in a manner satisfactory to their conflicting interests when, on May 30, 1913, a peace treaty between Bulgaria, Greece, Montenegro and Serbia on the one hand, and Turkey on the other, was signed at London[113].

Article 3 of this treaty reserved to the Great Powers "le soin de régler la délimitation des frontières de l'Albanie et toutes autres questions concernant l'Albanie". The Conference of Ambassadors thereafter adopted certain decisions in relation to Albania's status[114], but had great difficulties in delimiting the boundaries of the new state, especially in regard to the Southern frontier[115].

On August 11, 1913, the Converence adopted a resolution[116] under which a delimitation commission, entrusted with the task of delimiting the Albanian boundaries, was created. The territory over which the work of the Commission had to extend was carefully defined in the resolution[117]. The Commission concluded its work by a final Protocole, signed at Florence on December 17, 1913[118].

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[110] See MEDLICOTT, W.N. *The Congress of Berlin and After, a diplomatic history of the near Eastern Settlement, 1878 1880.* London, Methuen, 1938.

[111] See *Documents Diplomatiques.* Les Affaires Balkaniques, 1912-14. Tome II, pp. 185/6, 187; MOUSSET, Albert *L'Albanie Devant L'Europe, 1912-1929* Paris, Librairie Delgrave, 1930; pp. 11-20; SWIRE, J. *Albania, The Rise of a Kingdom* London, Williams & Norgate, 1929; pp. 61-172; STICKNEY, Edith P. *Southern Albania or Northern Epirus in European International Affairs, 1912 1923,* Stanford University, California, Stanford University Press, 1925; pp. 19-50.

[112] *Le Temps*, Paris, December 20, 1912.

[113] MARTENS, *N.R.G.*, 3e. Sér., Vol. 8, p. 16.

[114] *Ibid.*, Vol. 9., p. 650.

[115] GOOCH & TEMPERLEY, *British Documents;* Vol. X., p. 50.

[116] *P.C.I.J., Series C.*, No. 5-11, p. 293.

[117] *Loc. cit.*

[118] *Ibid.*, p. 266.

This Protocole failed to be consummated by agreement of the Big Powers, sponsors of the above described procedure, because of the breaking out of World War I. But the Albanian (and, likewise, the Greek) case demonstrates the extensive role the Big Powers attributed themselves in the matter[119] ; a role conceivable only in an epoch when the "Sovereign Equality" of states[120] was not yet firmly and formally established.

## B. *THE SETTLEMENT OF BOUNDARIES AFTER WORLD WAR I*

### i) *The Treaties of Peace, 1919-1923*

The role of the Big Powers reappeared, in many forms, in the aftermath of World War I, when the Peace Treaties wereelaborated.

Factually, it was the Supreme Council of the Principal Allied and Associated Powers (the United States, Great Britain, France, Italy and Japan) which was the decision making organ, inasmuch as definition of boundaries was concerned[121] . Juridically, however, the defeated states were formally signatories of the treaties which delimited their boundaries[122].

Thus, the Treaty of Peace between the Allied and Associated Powers[123] and Germany, signed at Versailles on June 28, 1919 defined, in Articles 27 and 28, the boundaries of Germany[124] ; the Treaty of Peace between the Allied and Associated Powers and Austria, signed at Saint-Germain-en-Laye on September 10, 1919 defined, in Article 27, the boundaries of Austria[125] ; the Treaty of Peace between the Allied and Associated Powers and Hungary, signed at Trianon on July 4, 1920 defined (Article 27) the Hungarian boundaries; the Treaty of Peace between the Allied and Associated Powers

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[119] Note that both Greece and Albania were recognized as Independent States before delimitation of their respective boundaries.

[120] See Article 2(1) of the *Charter of the United Nations*.

[121] See TEMPERLEY, Harold W.V. *A History of the Peace Conference in Paris*. London, Henry Fronde and Hodder & Stoughton. 1921.

[122] See *Treaties of Peace*. 1919-1923.

[123] This term is used to describe not the big power concert but a much larger body. for Belgium, Bolivia, Brazil, China, Cuba, Ecuador, Greece, Guatemala, Haiti, The Hedjaz, Honduras, Liberia, Nicaragua, Panama, Peru, Poland, Portugal, Rumania, The Serb-Croat-Slovene state, Siam, Czechoslovakia and Uruguay, together with the Principal Allied and Associated Powers, therein constituted the Allied and Associated Powers.

[124] See HINKS, A.R. "Boundary Delimitations in the Treaty of Versailles". *The Geographical Journal*. London, the Royal Geographical Society. Edward Stanford Ltd. 1919; Vol. 54 (July to December 1919), p. 103.

[125] See HINKS "The New Boundaries of Austria". *Ibid.*, p. 288.

and Bulgaria, signed at Neuilly-sur-Seine on November 27, 1919 defined (Article 27) the boundaries of Bulgaria[126] and the Treaty of Peace between the Allied Powers and Turkey, signed at Sèvres on August 10, 1920 defined (Article 27) the boundaries of Turkey.

The Peace Treaties were also signed by newly established states, which were therein recognized and had their boundaries delimited altogether[127]. Additional, subsequent treaties, to which the Principal Allied and Associated Powers were party, further delimited these boundaries[128].

Under Articles 117 of the Treaty of Versailles, 87 (2) of the Treaty of Saint-Germain, 72 (2) of the Treaty of Trianon and 58 of the Treaty of Neuilly, Germany, Austria, Hungary and Bulgaria respectively undertook to:

> "recognize the full force of all treaties or agreements which may be entered into by the Allied and Associated Powers with states now existing or coming into existence in future in the whole or part of the former Empire of Russia as it existed on August 1, 1914, and to recognize the frontiers of any such states as determined therein".

The defeated thus explicitly recognized the right of the Allied and Associated Powers (not that of the Principal Allied and Associated Powers) to conclude conventional delimitation treaties with states arising from the debris of the Russian Empire. The Principal Allied and Associated Powers were not conceded, under these stipulations, any particular rights which they could unilaterally exercise.

The Peace Treaties, however, formally consecrated such competence of the Big Powers, inasmuch as some boundaries, not delimited therein, were concerned.

Thus, by Article 89 of the Treaty of Saint-Germain, Article 74 of the Treaty of Trianon and Article 59 of the Treaty of Neuilly, Austria, Hungary and Bulgaria respectively recognized and accepted the exclusive competence of the Principal Allied and Associated Powers inasmuch as the delimitation of the boundaries of states, successors to Austria-Hungary, was contemplated.

Likewise, Article 87 of the Treaty of Versailles, to which Poland was

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[126] See HINKS "The New Boundaries of Bulgaria". *Ibid.*, Vol. 55, p. 127.

[127] See, for example, Articles 27 (7), 28 and 87 of the Versailles Treaty, which partially delimited Poland's boundaries.

[128] See the Treaty of Sèvres, signed on August 10, 1920, between the Principal Allied and Associated Powers and Poland Rumania, Yugoslavia and Czechoslovakia relative to certain frontiers of these states. *British Treaty Series*. No. 20, 1921, *Cmd.* 1548.

signatory, stipulated that "the boundaries of Poland not laid down in the present Treaty will be subsequently determined by the Principal Allied and Associated Powers". This provision is repeated, in connection with Poland's Eastern boundaries, in the Treaty of Peace between the Principal Allied and Associated Powers and Poland, signed at Versailles on June 28, 1919[129].

The competence of the Big Powers, thus recognized, can be juridically explained, in all the cases above cited, as a delegation of powers from the directly interested states, signatories of the Peace Treaties[130]. It had been effectively exercised by the Supreme Council, which utilised an organ already involved in the Albanian Affair – The Conference of Ambassadors[131].

ii) *The Conference of Ambassadors*

The Conference of Ambassadors of 1920, in contradistinction from former, *ad hoc* conferences bearing the same name[132] was practically a continuously active organ. Composed of representatives of Great Powers it had "a tendency to become an international organ where, if not all, at least many of the threads of European administration, legislation and the settlement of disputes would meet"[133].

Two resolutions of the Supreme Council[134] dealt with the Conference of Ambassadors and determined, though very imprecisely, its competence[135]. No hard and fast rule could be drawn, however, for the division of competence between the Conference of Ambassadors and the Supreme Council[136]; neither was any tangible rule established for the division of competence between the inter-Allied Conference of Ambassadors and the International League of Nations.

The activities of the Conference of Ambassadors concerning international boundaries were many and varied[137]. In this study we are interested only in the Conference's decision-making role in the process of boundary-making, a role which had been quite considerable – contemporaries have,

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[129] See *Treaties, Conventions, International Acts, Protocols and Agreements between the United States of America and other Powers* Washington, Government Printing Office, 1910-1938; Vol. III, p. 3714.

[130] See LAPRADELLE, *La Frontière*, pp. 132/3.

[131] See PINK, Gerhard P. *The Conference of Ambassadors. Paris, 1920-1931.* Geneva Research Center, Geneva Studies, Vol. XII, Nos. 4-5, February 1942.

[132] See PINK, pp. 14-19.

[133] *Ibid.*, p. 18.

[134] On its functions and composition see TEMPERLEY, *History of the Peace Conference*, Vol. I, pp. 262, 499; Vol. IV, p. 130; Vol. VI, p. 563.

[135] See *U.S. For. Rel.* 1919, Vol. I, p. 14; *ibid.*, p. 19; *ibid.*, p. 29; PINK, pp. 24-31.

[136] *Ibid.*, pp. 34/5.

[137] *Ibid.*, pp. 80-125.

in fact, called the conference the great "*délimitatrice*" of new boundaries[138].

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In the Jaworzina affair[139] the Permanent Court of International Justice had to examine the competence of the Conference of Ambassadors as a delimiting organ, as well as to define the legal nature of the conference's decisions in executing such functions.

It was already mentioned above that Article 87 of the Treaty of Versailles invested the Principal Allied and Associated Powers with the power of delimiting some of Poland's international boundaries.

Likewise, Article 81 of the same treaty reads:

> "Germany. . . recognizes the complete independence of the Czechoslovak state. . . Germany hereby recognizes the frontiers of this state as determined by the Principal Allied and Associated Powers and the other interested states"[140].

The Principal Allied and Associated Powers sought to discharge their above described task by a decision of September 27, 1919. According to this decision the boundary between Poland and Czechoslovakia in the Duchy of Teschen and in the Spisz and Orava regions had to be fixed on the basis of three plebiscites[141].

Subsequently, however, at the request of Poland and Czechoslovakia, the plebiscites were given up, and on July 10, 1920 the Polish and Czechoslovak delegates at the conference of Spa signed a declaration[142] by which they decided to accept that "the Allied Powers, after hearing both parties, shall take the necessary measures for the final settlement of the dispute".

In a resolution, approved by the Supreme Council on July 11, 1920[143] the representatives of France, Britain, Italy and Japan recognized that it had been shown to be impossible to settle the dispute either by plebiscite or by recourse to arbitration. They agreed, accordingly, to "consider that

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[138] TABOUIS, Geneviève. *Jules Cambon, par l'un des siens.* Paris, Payot, 1938; p. 369.

[139] Advisory Opinion Regarding the Delimitation of the Polish-Czechoslovakian Frontier, delivered on December 6th, 1923. *P.C.I.J.*, Series B, No. 8.

[140] Clauses of this kind are also to be found in Articles 91 of the Treaty of St. Germain and 75 of the Treaty of Trianon.

[141] Text in *P.C.I.J., Series C, No. 4*, p. 116.

[142] Text in *ibid.*, p. 123.

[143] *Ibid.*, p. 124.

it is now for the Supreme Council to take upon itself the responsibility of making a definite settlement" and instructed the Conference of Ambassadors "to examine this question with full powers to reach a decision and to define the Polish frontier".

On July 28, 1920 the Conference of Ambassadors made a decision on this subject[144]. It thereby delimited the Polish-Czechoslovak boundary in the disputed area and set up a delimitation commission, the powers of which it defined. On that very day the representatives of Poland and Czechoslovakia accepted the decision of July 11, 1920.

Poland, however, considered that the alignment indicated by the July 18, 1920 decision as to the district of Spisz was contrary to the principles of justice and equity, and formulated proposals for its modification[145], to which Czechoslovakia objected. This resulted in other decisions of the Conference of Ambassadors and, eventually, in referral of the problem to the Council of the League of Nations, and through it to the Permanent Court of International Justice[146].

The interest for us at present lies in the Court's interpretation of the juridical basis on which the Conference of Ambassadors made its decisions concerning delimitation of the international boundary in the disputed area.

On this question the Court advised that:

> "The legal basis of that decision (of July 28, 1920) is twofold.
> The Principal Allied and Associated Powers, by virtue of the powers which they claimed in regard to the determination of the frontiers of the new states, declared in their resolution of July 11th their willingness to assume responsibility for the settlement of the dispute. This resolution appeared to them all the more opportune as it was in conformity with the agreement of July 10th, 1920, between the two states concerned which agreement was, according to its very terms, concluded by Poland and Czechoslovakia on being apprised of the desires, of the Principal Allied Powers.
> The decision taken on July 28th is therefore the fulfillment at once of a resolution of the Principal Allied Powers and of an agreement between the interested parties"[147].

The Court further emphasized in this connection the importance of the joint declaration of July 28, 1920, in which the representatives of both disputant states declared their acceptance of the decision of the Conference of Ambassadors, and stated that:

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[144] See *ibid.*, p. 128; *L.N.T.S.*, Vol. 15, 1923, p. 259.
[145] See *P.C.I.J., Series C, No. 4*, p. 128; *L.N.T.S.*, Vol. 11, p. 49.
[146] See *P.C.I.J., Series B., No. 8*, pp. 16-19.
[147] *Ibid.*, p. 29.

"The two agreements give to the decision arrived at – over and above the authority possessed by a decision of the Principal Allied and Associated Powers in the case – the force of a contractual obligation entered into by the parties"[148]

The Court thus outlined a necessary differentiation between the general competence of the Conference of Ambassadors, rooted in the general, permissive clauses of the peace treaties (cited above), and its special competence, based on a special compromise, by which this organ had been solicited to delimit specific boundaries.

While the Conference, when it acts by virtue of its general competence, exercises a function wholly different from aribtration[149], in the case of the Conference acting by virtue of a special competence, its action is remotely similar to arbitration. "The decision taken on July 28th", noted the Court, "was taken in accordance with a common desire on the part of all concerned to arrive at a final settlement of the dispute between Poland and Czechoslovakia. In this respect it has much in common with arbitration".

The competence of the Conference of Ambassadors had, however, in both cases, a contractual basis, consisting either in the provisions of the Peace Treaties or in a special agreement of the parties concerned, and the Conference usually laid great emphasis on this fact[150].

It was by virtue of its general competence that the Conference of Ambassadors fixed, in Article II of its decision of March 15, 1923, the Polish-Rumanian and the Polish-Czechoslovak boundaries in Eastern Galicia (not part of pre-war Russia but of Austria, and given up by Austria under Article 91 of the Treaty of St Germain)[151].

Likewise, the Conference of Ambassadors, by its decision of February 16, 1923, fixed the Lithuanian-German boundary. By this decision the Memel region (not part of pre-war Russia but of Germany and given up by Germany by Article 99 of the Treaty of Versailles) was to be ceded to Lithuania[152]. This was followed by conventions between the Allied Powers and Lithuania, signed on March 15, 1924[153].

[148] *Ibid.*, p. 30

[149] See LAPRADELLE, *La Frontière*, p. 133

[150] But see *U.S. For. Rel.*, 1920, Vol I, pp. 51, 53, as to a different opinion of the United States' government "wherein it declares itself in principle, against the method of imposing conditions upon weaker powers by the Principal Powers"

[151] See SICHINSKY "The Problem of Eastern Galicia" *Documents of the American Association for International Conciliation.* No. 141, August, 1919, Vol. 2, 1920, pp. 912-923.

[152] See *New York Times*, February 21, 1921.

[153] *Foreign Affairs*, Vol. 2, No. 2 (1924), pp. 410-420; *Monthly Summary of the League of Nations.* Vol. 4, April 15, 1924, pp. 64-66.

As to Poland's boundary with Lithuania, the Conference of Ambassadors, by its decision of March 15, 1923, regarding the Eastern Frontiers of Poland[154], purported to delimit it. But the Conference's competence to so act was considered doubtful in this case, because of a lack of clear contractual basis[155], and the decision constituted a special case in the activity of the Conference, since it was never accepted by Lithuania, one of the parties directly concerned[156].

It has already been mentioned above that, under certain provisions of the 1919 Peace Treaties, the boundaries of states coming into existence from parts of the Russian Empire were recognized to be susceptible of being determined by agreements between the Allied and Associated Powers and these states. These provisions implicitly repudiated the competence of the Principal Allied and Associated Powers and, therefore, of the Conference of Ambassadors, to operate delimitations therein.

Lithuania, formerly part of the Russian Empire, was proclaimed an independent state in February, 1918. But the Treaty of Versailles did not deal with delimitation of its boundaries with Poland. Neither Lithuania nor Russia were parties to the Peace Treaties.

The Conference of Ambassadors could not, therefore, proceed to delimit the Polish-Lithuanian boundary by virtue of its general competence.

Accordingly, when a territorial conflict arose, in the aftermath of World War I, between the newly-established states of Poland and Lithuania, it was the Council of the League of Nations which first tried to settle it[157]. But on January, 1922 the Council abandoned its conciliatory efforts[158]. Lithuania was, at that time, apparently interested in having the Conference of Ambassadors regulate her problems with Poland[159].

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[154] See *L.N.T.S.*, Vol. 15, 1923, pp. 259-265.

[155] See SCELLE, Georges. "La situation juridique de Vilna et de son territoire" *R.G.D.I.P.*, Vol. 35, 1928, p. 730; *Consultations de MM. A. DELAPRADELLE, Louis LEFUR et André N. MANDELSTAM concernant la force obligatoire de la décision de la Conférence des Ambassadeurs du 15 mars, 1923.* Paris, Jouve & Cie. 1928.

[156] See Lithuania. Ministère des Affaires Etrangères *Documents diplomatiques. Conflit Polono Lithuanien. Question de Vilna, 1918 1924.* Kaunas, 1924 ("Lithuanian Yellow Book"); No. 152 Annexe I, p. 376; No. 152, p. 375; *L.N.O.J.*, 1923, pp. 582, 584.

[157] See WINDASS, Stan. The League and Territorial Disputes, in *The International Regulation of Frontier Disputes. Op. cit.*, pp. 43-53.

[158] Resolution of January 13, 1922. *Lithuanian Yellow Book*. Document No. III, p. 372; *L.N.O.J.*, 1922 (1), p. 99.

[159] In the same session the Lithuanian representative exposed the view that:

"L'origine du conflit réside dans l'absence d'une frontière définitive entre la Lithuanie et la Pologne. Il est permis d'affirmer que si le traité de Versailles qui a donné un statut juridique à la Pologne avait établie définitivement les frontières de ce pays, le grave conflit actuel qui

On February 15, 1923 Poland requested the Conference of Ambassadors to fix her Eastern frontiers. Lithuania, for its part, had addressed, on November 18, 1922, a note to the President of the Conference of Ambassadors[160] in which it declared that the Lithuanian government:

> "serait particulièrement reconnaissant aux Puissances alliées et associées, si, en vue de hâter l'avenement de l'êre de paix et d'amitié entre la Lithuanie et la Pologne, ces Puissances voulaient bien user du droit que leur confie l'article 87 du Traité de Versailles et fixer le frontières orientales de la Pologne, en tenant compte des engagements solenels de cet Etat envers l'Etat Lithuanien, ainsi que des intérêts vitaux et des droits de la Lithuanie".

Accordingly, the Conference of Ambassadors defined, in its decision of March 15, 1923[161], the "Eastern Frontiers of Poland" and the "Polish boundary" with Lithuania (not "the boundary between Poland and Lithuania"). It seems that the Conference acted, in this case, well within its powers as defined in Article 87 of the Treaty of Versailles, to determine those of Poland's boundaries which were not defined in the same Treaty, by vitue of the assent expressed by both interested states that it should so act[162].

iii) *Combined action by the Conference of Ambassadors and the League of Nations*

By virtue of Articles 11 and 15 of the League of Nations Covenant, the League, and its Council, were endowed with such powers as could apparently be relied upon in order to intervene in boundary disputes. The Covenant included no restricting stipulations in this matter.

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divise la Lithuanie et la Pologne n'eût point troublé la paix de l'Europe Orientale". Accordingly, he prayed the Council, in the name of his government:

> "de bien vouloir attirer l'attention du Conseil Suprême des Puissances Alliées et Associées sur la gravité de la situation, et de le prier de bien vouloir procédé à la fixation des frontières de la Pologne prévues par le Paragraphe 3 de l'article 87 du Traité de Versailles, fixation qui résoudrait en même temps le conflit Polono-Lithuanien".

See Annexe 295 d. Séance du Conseil du 13 Janvier 1923 *L N O J*, 1922 (1), p. 138; See also declaration in the 11th Session of the Council, of May 17:

> "Le gouvernement Lithuanien prie le Conseil de bien vouloir attirer l'attention des Puissances alliées sur l'urgence et la nécessité absolue de tracer les frontières orientales de la Pologne; ce droit ayant été donné aux dites Puissances par l'article 87 du Traité de Versailles".

*Ibid.*, p. 550.

[160] *Lithuanian Yellow Book*, No. 152, Annex 3, p. 382.

[161] *Op. cit.*

[162] For contrary opinions, see DE LAPRADELLE, LE FUR, MANDELSTAM, *op. cit.*; See also *L.N.O.J.*, 1923, pp. 238, 586, 670; *ibid.*, Special Supplement No. 11, p. 29.

As no clear distinction was ever established between the competence of the Conference of Ambassadors and that of the League, these tended to combine.

The consequence was a curious situation, wherein it happened that the competence of the Conference of Ambassadors and that of the League of Nations acted parallelly, successively, conjointly and with various combinations, with the parties urging for the one or the other organ's action, according to their interests.

A case in point (but see also above the Polish-Czechoslovak boundary dispute) relates to delimitation of the boundaries of Albania.

Part of its territory (as defined in 1913) having been occupied by Greek and Yugoslav troops, Albania, on April 29, 1921, appealed to the League, on the basis of Article II and Article 15 of the Covenant, "to take steps which the situation demands to obtain the evacuation by Greece and Serbia" of some districts of Albania "unlawfully occupied by them". The appeal assumed that Albania's boundaries "had been fixed in 1913 by the Great Powers in a Conference of Ambassadors"[163].

Albania's appeal was discussed by the Council on June 25, 1921[164]. In this discussion the Yugoslav and the Greek representatives argued that the Conference of Ambassadors had the exclusive competence to deal with the question of Albania's boundaries[165].

The Albanian delegate expressed the view that the League of Nations, as "successor of the European Concert" was exclusively competent to deal with the matter. He insisted, therefore, that "the Albanian question should be discussed and decided by the League of Nations", and warned that "Albania . . . could not recognize the Conference of Ambassadors if the latter intended to fix new frontiers which had been determined before the war broke out"[166].

The Rapporteur (Mr. Fischer) was not prepared to say that the Conference of Ambassadors had exclusive competence in the matter, nor that the League would not, in certain cases, be competent to reach a conclusion. He had no doubt, however, that the Conference of Ambassadors was competent to fix the boundaries of Albania, his juridical argument being that Article 89 of the Treaty of St. Germain, which empowered the Principal Allied and Associated Powers to fix the boundaries of Greece and Yugoslavia, implied such competence as to Albania also.

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[163] See *L.N.O.J.*, 1921, (2) p. 474.
[164] *League of Nations, Minutes of the 13th Session*, 1921, p. 44.
[165] *Ibid.*, p. 45.
[166] *Ibid.*, p. 44.

This interpretation is doubtful. The competence of the Conference of Ambassadors to delimit Albania's boundaries could not be based on the stipulations of the Peace Treaties, in none of which Albania figured as a contracting party. The real, political reason for the Rapporteur's proposition not to contest the competence of the Conference of Ambassadors was, evidently, his acknowledgement that "The question of Albania's boundaries was at present being considered by the Council (Conference) of Ambassadors"[167].

As a matter of fact, the Conference of Ambassadors, upon a proposal of the British government, dated June 6, 1921[168] undertook to determine Albania's boundaries, and charged a Committee of experts to study the question and to present a report[169].

Accordingly, the League's Council resolved that "in these circumstances" it "considers it inadvisable to take up the question simultaneously" and "pending the solution which will be communicated to it" recommended the three parties "strictly to abstain from any act calculated to interfere with the procedure in course"[170]. A telegram from the Albanian Prime Minister followed immediately, by which the Albanian government declared that

> "it does not acknowledge the competence of the Conference of Ambassadors to reopen the question of its frontiers, as the latter were definitely fixed by the Conferences of London and Florence"[171].

The question was brought before the Second Assembly of the League, which by its resolution of October 2nd, 1921[172].

> "Taking note of the fact that the Serbo-Croat-Slovene state and Greece have recognized the Principal Allied and Associated Powers as the appropriate body to settle the frontiers of Albania",

recommended Albania to accept the forthcoming decision of the Principal Allied and Associated Powers. This resolution was adopted unanimously by all the members, including Albania, and has, therefore, been interpreted as an agreement concerning the competence of the Conference of Ambassadors[173] or as acquiescence on Albania's part to this effect[174].

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[167] *Ibid.*, p. 46.
[168] See *P.C.I.J., Series C*, No. 5, Vol. II, p. 303.
[169] *Ibid.*, p. 304.
[170] *L.N.O.J.*, 1921, p. 481.
[171] *Ibid.*, p. 483.
[172] *League of Nations Assembly.* Plenary Session. 1921. 28th Plenary Meeting, pp. 674/5.
[173] See PINK, pp. 112/3.
[174] See *P.C.I.J., Series B*, No. 9, p. 14.

On November 9, 1921, the Conference of Ambassadors, emphasizing the obligations undertaken by Greece and Yugoslavia as signatories to the Peace Treaties, and relating to the above described resolution of the Assembly, delimited the disputed boundaries.

The decision was thereafter accepted by the governments concerned: Greece[175], Yugoslavia[176] and Albania[177]. Albania thus surrendered to the pressure exerted upon her to accept the decision of the Conference of Ambassadors and, by her acceptance, validated the Conference's alignment.

## C. *BOUNDARY SETTLEMENTS AFTER WORLD WAR II*

The role of the Big Powers in boundary questions has reappeared, after the Second World War, in the elaboration of the Peace Treaties. Though a politically dominant role, it was however never juridically operative when delimitation was effectively carried out.

Thus, the Big Powers, in the Yalta (Crimea) Conference of February 11, 1945, agreed that the eastern boundary of Poland should follow the 'Curzon Line' (an alignment preconized by Lord Curzon on the event of Poland's accession to independence in 1919) with minor digressions in favour of Poland[178]. But the boundary's delimitation was effectively operated by both states concerned, Poland and the U.S.S.R., in the Treaty signed at Moscow on August 16, 1945[179]. Article I of this Treaty reads, nonetheless, that "in conforming with the decision taken at the Crimea Conference, the state frontier between the Polish Republic and the U.S.S.R. shall follow the Curzon line, with deviations. . ." and Article 2 defines the boundary accordingly.

As to Poland's western boundaries, the Big Powers, at Potsdam as formerly in Yalta, left their delimitation to be operated at the peace settlement, which never took place[180].

Likewise, the Great Powers, victors in the war, endowed themselves in their declaration of June 5, 1945 regarding the assumption of Supreme Authority over Germany[181] with the competence to determine "the

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[175] *League of Nations Council* 15th Session, p. 20; *L.N.O.J.*, 1921, p. 1206.

[176] *Ibid.*, p. 1196.

[177] *Ibid.*, p. 1209 ff.

[178] See *B.F.S.P.*, Vol. 148, pp. 80-88; *U.S. For. Rel., The Conferences of Malta and Yalta*, 1945. pp. 968-975.

[179] See *U.N.T.S.*, Vol. 10, pp. 193-201.

[180] See *supra*, Chapter One, Section 2, A (i).

[181] *Selected Doc. on Germany*; pp. 134-135; *Doc. on Germany Under Occupation*. pp. 39/30.

boundaries of Germany". But effective delimitations (as far as operated) were carried out by bilateral agreements between the Federal Republic of Germany and her neighbours, exclusively[182].

The boundaries of other defeated European states were delimited in the Peace Treaties, to which were signatories the "Allied and Associated Powers"[183] on the one part and Italy, Rumania, Bulgaria, Hungary and Finland (separately) on the other part[184].

By their joint declaration of February 10, 1947, reproduced in Annex XI of the Peace Treaty with Italy, the governments of the U.S.S.R., of the U.K., of the U.S.A., and of France reserved themselves the power to "adjust" the boundaries of "Italy's Possessions in Africa"[185]. Delimitations were, here again, operated bilaterally by the affected states, after the United Nations declined to carry them out, albeit apparently requested to do so by the Big Powers[186].

The referral of the matter, in this case, to the International Organization, marks the end of the era of the Big Powers, as far as delimitation of international boundaries is concerned; no such operation was carried out by those powers during the last quarter of a century.

## SECTION 3: INTERNATIONAL ORGANIZATIONS AND DELIMITATION

### A. *THE LEAGUE OF NATIONS*

It was already mentioned above that the Covenant of the League of Nations contained no limitation as to the Organization's competence to deal with boundary problems.

This competence, by the terms of Articles 3, 4, 11, 12 and 15 of the Covenant, was, however, of a general and undetermined nature, and restricted to recommendations. The competence of the Council and of the Assembly of the League did not include, therefore, the power to delimit boundaries, an operation requiring an authoritative decision-making capacity which these organs completely lacked.

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[182] See *supra*, Chapter One, Section 3, B (i).

[183] The U.S.S.R., the U.K., the U.S.A., China, France, Australia, Belgium, the Byelorussian S.S.R., Brazil, Canada, Czechoslovakia, Ethiopia, Greece, India, the Netherlands, New Zealand, Poland, the Ukranian S.S.R., the Union of South Africa and the Federal Republic of Yugoslavia.

[184] See *Treaties of Peace*, 1947; pp. 6, 79, 99, 117, 138.

[185] *Ibid.*, p. 65.

[186] See *infra*, Chapter One, Section 3, B, ii (a).

Even with no general competence to delimit appertaining to it the League's Council could, nonetheless, operate delimitations by virtue of a special competence conferred upon it. "Though it is true that the powers of the Council, in regard to the settlement of disputes" remarked the Permanent Court of International Justice in the Frontier between Turkey and Iraq case[187]

> "are dealt with in Article 15 of the Covenant, and that, under that article, the Council can only make recommendations, which even when made unanimously, do not of necessity settle the dispute, that article only sets out the minimum obligations which are imposed upon states and the minimum corresponding powers of the Council. There is nothing to prevent the parties from accepting obligations and from conferring on the Council powers wider than those resulting from the strict terms of Article 15, and in particular from substituting, by an agreement entered into in advance, for the Council's power to make a mere recommendation, the power to give a decision which, by virtue of their previous consent, compulsorily settles the dispute".

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The Council could be conferred with a special competence to delimit a given boundary by virtue of a special treaty provision, such stipulation being susceptible of extensive interpretation in this context.

Thus, Article 3 (2) of the Treaty of Lausanne[188] provided that:

> "The frontier between Turkey and Iraq shall be laid down in friendly arrangement to be concluded between Turkey and Great Britain within nine months from the coming into force of the present Treaty.
> In the event of no agreement being reached between the two governments within the time mentioned, the dispute shall be referred to the Council of the League of Nations".

When negotiations between the parties failed, the British government, on August 25, 1924, referred the matter to the League of Nations. On the same day the Turkish government agreed in principle to the inscription of the question on the agenda of the Council.

Before the Council, however, the parties differed in their conceptions as to its role, for whereas the British representative maintained that what was intended by Article 3, Paragraph 2, of the Treaty of Lausanne was "an arbitral decision given on the broad merits of the case" his Turkish colleague claimed that "the only possible procedure" was "to reach a

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[187] *P.C.I.J., Series B*, No. 12; p. 27.
[188] *Ibid.*, p. 14.

solution with the consent of the parties through the good offices of the Council"[189]. He thus conceived of the Council's role as a simple mediation, its action being taken under Article 15 of the Covenant.

The Permanent Court of International Justice, to which the question was referred, interpreted Article 3 (2) in the light of the general principle of the international boundary's stability and finality[190], and therefore advised that

> "The 'decision to be taken' by the Council of the League of Nations in virtue of Article 3, Paragraph 2, of the Treaty of Lausanne, will be binding on the parties and will constitute a definitive determination of the Frontier between Turkey and Iraq".

The Court thus gave a very liberal interpretation to the parties' intention as to the Council's role, this interpretation being motivated by the Court's conception of "the very nature of a frontier and of any convention designed to establish frontiers between two countries"[191].

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A secondary category of cases wherein the Council of the League of Nations found itself endowed with an authoritative delimitation operating capacity occurred when the parties (or the organs competent to delimit) have undertaken beforehand to accept a recommendation by the Council. "This, in effect," found the Court in the Frontier between Turkey and Iraq case[192] "is tantamount to entrusting it (the Council) with the power of decision".

A case in point relates to the delimitation of the Polish-German boundary in Upper Silesia.

Article 88 of the Treaty of Versailles provided that in the portion of Upper Silesia included within the boundaries therein described, the inhabitants shall be called upon to indicate by a vote whether they wish to be attached to Germany or to Poland.

The last Paragraph recognized the power of the Big Powers, victors in the war, to delimit the boundary in the area. It read:

> "Germany hereby renounces in favour of Poland all rights and title over the portion of Upper Silesia lying beyond the frontier line fixed by the Principal Allied and Associated Powers as the result of the plebiscite".

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[189] *Ibid.*, p. 18.
[190] See *supra*, Introduction, B (3).
[191] *Op. cit.*, p. 19.
[192] *Op. cit.*, p. 27.

The plebiscite was to take place on March 29, 1921. But its application revealed itself to be difficult to operate[193].

In these circumstances the Supreme Council of the Principal Allied and Associated Powers, on August 21, 1921, adopted the following resolution:

> "The Supreme Council, before taking a decision on the future of the frontier between Germany and Poland in Upper Silesia, in conformity with Article 88 of the Treaty of Versailles, decided, in application of Article II, paragraph 2, of the Covenant of the League of Nations, to submit to the Council of the League the difficulties involved by the delimitation of this frontier, and to request the Council to inform it of the solution it recommends for the tracing of the frontier line which it is the business of the Principal Allied and Associated Powers to establish.
> In view of the situation in Upper Silesia, the Council of the League of Nations is requested to treat this matter as one of the greatest urgency"[194].

Up to this point there was nothing exceptional. "The Powers represented on the Supreme Council", noted the President of the League's Council[195] "have requested the Council of the League to make any recommendation which it is entitled to make and to transmit it to these powers which alone, according to the Treaty (of Versailles), can take the final decision".

On August 24th, 1921, however, a note from M. Briand stated that the powers represented in the Supreme Council "solemnly undertook" to "accept the solution recommended by the Council of the League of Nations"[196]. Consequently, the League's Council interpreted the Supreme Council's demand as a demand for arbitration, with the parties engaging to accept its recommendations[197].

Hence, it was by virtue of the consent of the Principal Allied and Associated Powers that the Council of the League was endowed with delimitating capacity in this case; delimitation, being *a priori* a definitive operation, could be carried out only on the basis of the special agreement of the powers to accept the solution "recommended". The "recomendation" was, thus, actually an authoritative decision, which effectively delimited the boundary[198].

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[193] See WAMBAUGH, Sarah. *Plebiscites Since the World War*. Washington. Carnegie Endowment for International Peace. 1933; pp. 206-271.

[194] *L.N.O.J.*, 1921 (3), p. 982.

[195] See *Ibid.*, p. 1221.

[196] *Loc. cit.*

[197] *Op. cit.*, pp. 1220-1223.

[198] See *op. cit.*, pp. 1223-1226 for text of the "recommendation", as forwarded to the Supreme Council of the Principal Allied and Associated Powers. The boundary thereupon delimited was thereafter accepted, *verbatim*, by the Conference of Ambassadors (*ibid.*, pp. 1226-1227).

In a similar case – relating to the Austro-Hungarian boundary in the Burgenland Region – the competence of the Council was modified by the initiative of the interested parties.

By the Protocole of Venice of October 13, 1921[199] Austria and Hungary agreed to submit the question of the appurtenance of the town of Sopron (Oedenburg) to plebiscite[200].

In the same document, however, Austria undertook to accept "the decision recommended by the Council of the League of Nations" in case she will appeal against the decisions of the Inter-Allied delimitation Commission, provided for in the Protocol[201]. When Austria thus appealed to the Council, and Hungary, on April 13, 1922, equally demanded the Council to arbitrate[202], the Council, on September 13, 1922 delivered a decision, termed "recommendation", by which the boundary was delimited[203].

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From all the cases herein reviewed it clearly appears that the action of the League as a delimitating organ had little to do with its general functions[204].

Inasmuch as the Council's competence to delimit was based on special agreement of the parties concerned, its function somewhat resembled arbitration, at least in the wide sense of the term, characterized simply by the binding force of the pronouncement made by a third party to whom the interested parties have had recourse[205]. Matters were so because the League of Nations *a priori* lacked any general competence to delimit international boundaries, the Covenant limiting its action exclusively to recommendations.

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[199] *L.N.T.S.*, Vol. 9 (1922), p. 204.

[200] See WAMBAUGH, pp. 271-298.

[201] *Op. cit.*, p. 209.

[202] *L.N.O.J.*, 1922 (2), p. 1315; see also *ibid.*, pp. 1334, 1336 for further declarations of the parties.

[203] *Ibid.*, p. 1338.

[204] On the nature, object and extent of delimitation action of the League in relation to mandated territories see LAPRADELLE, *La frontière*, pp. 118-140.

[205] See Advisory Opinion No. 12, *op. cit.*, p. 26.

## B. *THE UNITED NATIONS*

### i) *The Question of Competence*

Unlike the situation in the League of Nations, the Security Council of the United Nations was endowed by the Charter[206] with an authoritative decision-making capacity. Thus it was not *a priori* precluded from operating delimitations of international boundaries.

Decisions binding the members in the present context can, however, be adopted by the Council solely within the framework of Chapters VI, VII, and VIII of the Charter[207].

Acting by virtue of Chapter VI ("Pacific Settlement of Disputes") the Council's *ex officio* action is confined to promotive, precursory activities aimed at the pacific settlement of disputes.

Acting under Chapter VII ("Action with Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression") the Council may refer only to enforcement measures for maintaining or restoring peace[208].

The provisions of the Charter, therefore, do not authorize the Council to impose decisions concerning the substance of disputes. It has, consequently, no general competence to operate delimitations. This conclusion conforms with the practice of the Organization in the matter.

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The question of a general competence to delimit international boundaries was dealt with in some length on the occasion of the discussion in the First Committee of the General Assembly of Italy's former African colonies[209] at its 323rd meeting, held on November 11, 1949[210] as well as at the 9th, 10th, and 13th meetings of its 17th Sub-Committee, held on 14, 17 and 18 October, 1949, respectively.

The question at issue was, actually, the general competence of the General Assembly (not of the Security Council), and representatives who expressed an opinion on the subject rightly held that the Assembly had no

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[206] See Article 24, paragraphs 1 and 2, Article 25 and Article 39.

[207] KELSEN, Hans. *The Law of the United Nations.* London, Stevens & Sons Ltd., 1950; pp. 95-98, 284/5, 293-295, 444-450; CASTAÑEDA, Jorge. *Legal Effects of United Nations Resolutions.* New York, Columbia University Press, 1969, pp. 71/2; RUSSEL, Ruth B. *A History of the United Nations Charter.* Washington, D.C., The Booking Institution, 1958, p. 665; GOODRICH, Leland M., HAMBRO, Edward and SIMONS, Anne P. *Charter of the United Nations* (3rd Ed.). New York, Columbia University Press, 1969, pp. 208/9.

[208] GOODRICH, HAMBRO and SIMONS, p. 300; RUSSEL, p. 669.

[209] *Cf. infra,* this Section, B ii (a).

[210] See *G.A.O.R.*, 4th Session, 1949.

competence under the Charter to delimit or adjust international boundaries[211].

The reasons advanced for rejection of the Assembly's competence were not, however, based on an examination of the nature of its decision-making capacity according to the provisions of the Charter (which is restricted to recommendations), but instead generally upheld the doctrine of state sovereignty in this context.

Thus, the Soviet representative, in the 323rd meeting of the First Committee, expounded the view that "the problem of boundaries could not be referred to an international body" because "normally boundaries were fixed in accordance with bilateral agreements concluded between independent states, or, if necessary, between independent states and administering authorities or even between several administering authorities"[212].

The Ethiopian delegate considered that Annex XI, Paragraph 3 of the Italian Peace Treaty only affected the General Assembly insofar as the disposal of the former Italian Colonies was concerned and that, consequently, the Assembly had no competence in questions concerning the rectification or adjustment of boundary lines which are not mentioned at all in that Paragraph, since this question should be settled between the sovereign states concerned[213].

This opinion was shared by the Turkish delegation[214] and by the Polish representative, who estimated that any delimitation of boundaries should be settled by negotiations between sovereign states[215].

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As to special competence, it would seem that nothing in the Charter prevents parties from conferring upon the Security Council, or the General Assembly, the power to operate a valid delimitation[216].

In fact, Article 3 of Annex XI of the Peace Treaty with Italy[217], which stated that "the matter shall be referred to the General Assembly

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[211] See United Nations, General Assembly. *"Study of Procedure to Delimit the Boundaries of the Former Italian Colonies"* Memorandum prepared by the Secretariat. *U.N. Doc A/AC 18/103* January 27, 1950; p. 11

[212] *Op. cit.*, p. 251.

[213] *Op. cit.*, p. 252.

[214] *Loc. cit.*

[215] *Op. cit.*, p. 253.

[216] See CASTEÑADA, pp. 139 149; HIGGINS, Rosalyn. *The Development of International Law through the Political Organs of the United Nations* London, Oxford University Press, 1963; pp 327/8

[217] *U.N.T.S.* (No. 747), Vol. 42 (1949), p. 3ff.

of the United Nations for a recommendation, and the Four Powers agree to accept the recommendation and to take appropriate measures for giving effect to it" singularly resembles the Upper Silesian affair[218] as in both cases the parties undertook beforehand to accept a recommendation.

Unlike its predecessor, however, the United Nation's organ did not delimit the boundaries in question, but confined its action to indicating to the parties which procedure they should follow in order to delimit their boundaries.

It should be noted, moreover, that in the discussions in the First Committee of the Assembly and in its 17th Sub-Committee, in which the question was examined in detail, the tendency was to interpret the specific competence of the General Assembly, based on Annex XI, very restrictively, the representatives drawing subtle distinctions between the General Assembly's competence "to adjust" the boundaries of the former Italian colonies and its competence "to delimit" them[219].

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In the recent quarter of a century there have been many boundary disputes, a large number of which[220] gave rise to armed clashes and could reasonably be considered as a "threat to the peace, breach of the peace or act of aggression" (Article 39 of the Charter) or, at least, a "dispute, the continuance of which is likely to endanger the maintenance of international peace and security" (Articles 36 (I), 37 (2). But the Security Council has not tried to settle one of these disputes by directly delimiting the boundary in the conflict area. If we do not hide ourselves in an illusory world of tidy rules, but stay concerned in the realities of international life, we are bound to acknowledge, therefore, that in the United Nations delimitation of international boundaries is considered an operation beyond the scope of the Security Council's power to perform. *Optimus interpres rerum usus.*

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[218] *Supra*, p. 185.

[219] See *Study of Procedure to Delimit the Boundaries of the Former Italian Colonies*; pp. 11-13.

[220] Eire-Northern Ireland (1945-1960); Afghanistan-Pakistan (1950-1962); Saudi Arabia-Abu Dhabi and Muscat (1952-1956); Cambodia-Thailand (1953-1962); China-India (1954-1962); China-Burma (1956-1960); Nicaragua-Honduras (1957-1961); Egypt-Sudan (1958); Iraq-Kuwait (1962); Morocco-Algeria (1962); China-U.S.S.R., (1963); Somalia-Kenya (1963-1967); Somalia-Ethiopia (1963-1967); Argentina-Chile (1965); Yemen-Aden (sporadic); India-Pakistan (1947-1949); India-Hyderabad (1947); Israel-Arab states (1948-1949, 1956, 1967); Indonesia-Malesia (1963); Pakistan-Kashmir (1963).

ii) *Trends in United Nations Action Concerning Delimitation*

The United Nations, in its attempts to defuse and settle boundary disputes, usually confined its action to patching-up operations and to preventive activities. The investigation of this activity falls beyond the scope of the present study[221].

There are few examples, however, of United Nations' action referring directly to delimitation. As is illustrated below, the Organization restricted its action to promotive, precursory activities, leaving the task of delimitation proper to the interested parties. As was demonstrated above, the sovereignty dogma was invoked from the Organization's early days, when the question of capacity to delimit arose; it is therefore clear why the action of the Organization did not amount to delimitation.

a) *The Case of Libya*

Article 23 of the Treaty of Peace with Italy[222] provided that the final disposal of Libya, Eritrea and Italian Somaliland:

> "should be determined jointly by the Governments of the Soviet Union, of the United States of America, of the United Kingdom, and of France within one year from the coming into force of the present Treaty (15 September, 1947) in the manner laid down in the joint declaration of February 10, 1947, issued by the said Governments, which is reproduced in Annex XI."

Annex XI provided:

> "1. The Governments of the Union of Soviet Socialist Republics, of the United Kingdom of Great Britain and Northern Ireland, of the United States of America, and of France agree that they will, within one year from the coming into force of the Treaty of Peace with Italy bearing the date of February 10, 1947, jointly determine the final disposal of Italy's territorial possessions in Africa, to which, in accordance with Article 23 of the Treaty, Italy renounces all right and title.
> 2. The final disposal of the territories concerned and the appropriate adjustment of their boundaries shall be made by the Four Powers in the light of the wishes and welfare of the inhabitants and the interests of peace and security, taking into consideration the views of the interested Governments.
> 3 If with respect to any of these territories the Four Powers are unable to agree upon their disposal within one year from the coming into force of the Treaty of Peace with Italy, the matter shall be referred to the General Assembly of the United Nations for a recommendation, and the Four Powers agree to accept the recommendation and to take appropriate measures for giving effect to it."

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[221] On this subject see JONES, A. The United Nations and Frontier Disputes in *The International Regulation of Frontier Disputes, op. cit.*, pp. 86-108.

[222] *Op. cit.*

On September 15, 1948, the Four Powers informed the Secretary General of the United Nations[223] that they had been unable to reach an agreement regarding the disposal of the territories and that, in conformity with the terms of the Peace Treaty, they were referring the question to the United Nations in order that it might be examined during the third regular session of the General Assembly.

The General Assembly, at its 143rd meeting on September 24, 1948, referred the matter to the First Committee, wherein the examination of the issue was deferred until the second part of the third session in April-May, 1949.

On November 9, 1949, the First Committee adopted a decision calling for Libyan independence not later than January 1, 1952[224]

As to boundaries, Sub-Committee 17 of the First Committee discussed the question at three meetings. The primary issue was the competence of the Generaly Assembly to deal with it. General agreement was finally reached in the Sub-Committee, and subsequently in the First Committee, that the Generaly Assembly could fix a procedure for delimitation, but that "the Assembly had no competence under the Charter to delimit or adjust international frontiers"[225].

Accordingly, on November 11, 1949, a draft resolution was introduced by the delegations of Argentina and Turkey in the First Committee, the operative paragraph of which called upon the Interim Committee "to study the procedure to be adopted to settle the question of the boundaries of the former Italian Colonies insofar as they are not already fixed by international agreement and report with conclusions to the fifth regular session of the General Assembly"[226]. A French suggestion at the Committee's 323rd meeting that the phrase "to settle the question" be replaced by the words "to delimit" was accepted. The draft resolution, as amended, was adopted in Plenary Session, and the matter referred to the Interim Committee.

The Interim Committee, at its 36th meeting held on January 16, 1950, requested the Secretariat to prepare an analysis as to the possition with respect to the boundaries concerned.

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[223] U.N. Doc. *A/645.*

[224] *G.A.O.R.* 3rd Session, 1948/9. Annex, Doc. *A/1089.*

[225] "*Study of Procedure to Delimit the Boundaries of the Former Italian Colonies*". United Nations Doc. *A/AC. 18/103,* January 27, 1950, p. 11. Mimeographed.

[226] *G.A.O.R.*, 4th Session, 1949, First Committee, Annexes to Summary Records, Agenda item 19 (*A/C. 1/536/Rev. I*, Novem ber 11, 1949), p. 35.

In compliance with this request, the Secretary-General submitted to the Committee a memorandum entitled "study of procedure to delimit the boundaries of the former Italian Colonies,"[227] setting forth the position regarding the several boundaries of the respective territories. This memorandum was considered by the Interim Committee at its 37th meeting, held on February 7, 1950.

On September 15, 1950, at the 45th meeting, a draft resolution on procedure for delimiting certain of the boundaries was submitted by the delegation of the United States of America[228]. This draft resolution was annexed to the report of the Interim Committee to the General Assembly. It called, notably, for the General Assembly, with respect to Libya, to recommend:

> "That the portion of its boundary with French territory not already fixed by international agreement be delimited, upon Libya's achievement of independence, by negotiation between the Libyan and French Governments, assisted upon the request of either party by a person to be selected by them or, failing their agreement, to be appointed by the Secretary-General of the United Nations"[229].

This draft resolution was recommended by the *Ad Hoc* Political Committee, with the words "not already fixed" changed to "not already delimited" and with a further recommendation that "with respect to any other boundaries not delimited by international agreements the parties concerned seek to reach agreement by negotiation or by arbitration", referred, on December 14, 1950, to the General Assembly[230], and adopted by the latter on the following day as resolution 289 (IV)[231].

The representative of the Soviet Union voted against the resolution, estimating that

> "it is contrary to the Treaty of Peace with Italy for the General Assembly to consider the question of the boundaries of the former Italian Colonies, for that Treaty provides that the adjustment of the boundaries of Italy's former territorial possessions is a matter which falls within the Jurisdiction of the Four Powers".

He cited Annex XI, paragraph 2 of this treaty as proof, and resumed that "the question of boundaries remains fully within the competence of

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[227] *Op. cit.*

[228] *G.A.O.R.*, 5th Session, 1950 Supplement, No. 14 (*A/AC. 18/118/Rev. I*) Annex C.

[229] *Loc. cit.*

[230] *G.A.O.R.*, 5th Session. Annexes. Agenda item 21 (*A/1723*, Dec. 14 1950), p. 141.

[231] *G.A.O.R.*, 5th Session, 1950. 326th. Plenary meeting, December 15, 1950, pp. 683-684.

the Four Powers and the consideration of this matter by the General Assembly is contrary to that treaty"[232].

It should be noted, however, that the members of the 17th Sub-Committee in the third Session expressly differentiated between "adjustment" and "delimitation" of boundaries, interpreting the latter term as meaning original delimitation[233]. The resolutions of the General Assembly refer to this sense of the term "delimitation" exclusively[234] and recommend procedure for delimitation of "part of (the Libyan) boundary with French territory" only, because all other Libyan international boundaries had already been fixed conventionally prior to independence[235].

The Soviet objection, therefore, found no merit with other representatives insofar as the Assembly dealt with procedure for original delimitation only, which, in their opinion, was not contrary to the Treaty of Peace with Italy, that treaty referring to "adjustment" only.

As to "adjustment", the Egyptian representative, by a letter dated July 12, 1950, addressed to the Secretary-General of the United Nations[236], requested the inclusion in the agenda of the Fifth Session of the General Assembly of an item entitled "the appropriate adjustment of the frontiers between Egypt and the former Italian Colony of Libya, with particular reference to paragraphs 2 and 3 of Annex XI of the Treaty of Peace with Italy". He obviously gave these provisions an interpretation wholly inconsistent with that of his Soviet colleague. However, at the request of the Amir of Cyrenaica not to adopt any decision adversely affecting Libyan territory before the achievement of independence, the Egyptian delegation asked the General Assembly, while keeping the matter on its agenda, to defer discussion on it until the 6th Session[237].

The matter was deferred to the Sixth Session of the Assembly. At the *Ad Hoc* Political Committee 54th meeting[238] it was not discussed. A simple proposition to the General Assembly was, instead, forwarded[239] and adopted in the 370th Plenary meeting, on February 1, 1952. This read:

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[232] *Loc. cit.*

[233] See "*Study of procedure to delimit*", *op. cit.*

[234] See Resolution 289 (IV) C. *op. cit.*

[235] See "*Study of procedure to delimit*", *op. cit.*; PELT, pp. 421-423.

[236] *G.A.O.R.*, 5th Session, 1950. Annexes. Agenda Item 59 (*U.N. Doc. A/1291*).

[237] *G.A.O.R.*, 5th Session, 1950. 325th Plenary meeting, December 14, 1950, p. 681.

[238] *G.A.O.R.*, 6th Session, 1951-52, p. 307.

[239] *Loc. cit.*

"The General Assembly,

Takes note of the intention of the Government of Egypt to enter into negotiations with the Government of the United Kingdom of Libya with a view to settling in a friendly and good-neighbourly spirit the question of the appropriate adjustment of the frontiers between Egypt and the United Kingdom of Libya, with particular reference to paragraphs 2 and 3 of Annex XI of the Treaty of Peace with Italy"[240]

b) *Security Council Resolution 242 of November 22, 1967 and the Problem of Delimitation*

Whereas the General Assembly, in the Libyan affair, refrained from delimiting boundaries and limited its contribution to recommendation of adequate procedures, it interfered, nonetheless, with the substance of the issue, inasmuch as it recommended to the parties to delimit their boundaries, even though delimitation of international boundaries is not an obligation incumbent upon adjacent states under general international law.

This practice was followed by the Security Council when it came to deal with the Arab-Israeli conflict subsequent to the June, 1967 war.

Indeed, whereas Resolution 242, adopted by the Security Council at its 1382nd meeting on November 22, 1967[241] contains nothing precise as to location of boundaries in the Middle East[242], it undoubtedly calls upon all states involved in the conflict to establish international boundaries. The establishment of such boundaries is clearly regarded by the Security Council as a factor for making peace and a means of recognition of sovereignty.

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[240] General Assembly Resolution 516 (VI), February 1, 1952. Text in *G.A.O.R.*, 6th Session, Supplement No. 20 (*U.N. Doc. A/2119*), p. 13.

[241] *S.C.O.R.*, 22nd year. *S/INF/22/Rev. 2.*

[242] The Operative paragraph, in this context, reads:

"The Security Council. . .

I. Affirms that the fulfillment of Charter principles requires the establishment of a just and lasting peace in the Middle East which should include the application of both the following principles:

i) Withdrawal of Israeli armed forces from territories occupied in the recent conflict;

ii) Termination of all claims or states of belligerency and respect for and acknowledgement of the sovereignty, territorial integrity and political independence of every state in the area and their right to live in peace within secure and recognized boundaries free from threat or acts of force".

*Loc. cit.*

The only reference to boundaries, stating that they must be secure and recognized is, of course, no indication as to their location, although these can be regarded as distinct guidelines. See BLUM, Yehuda Z. *Secure Boundaries and Middle East Peace.* Jerusalem, Institute for Legislative Research and Comparative Law, 1971.

The formulation of the first operative paragraph of the British draft resolution (later adopted by the Council as Resolution 242), therefore proved unpopular with Arab delegates at the United Nations, who insisted on rights of belligerency and on a policy of non-recognition towards Israel. While insisting that the wording of paragraph I (i) read either that Israeli forces would be withdrawn from "all the territories" instead of "territories" or that Israel would "withdraw to the positions of 4 June, 1967", they were also unwilling to accept the phrase "recognized boundaries" occurring in paragraph I (ii)[243].

The position of Israel as to this issue was stated as length by its Foreign Minister before the Security Council in its 1375th meeting, on November 13, 1967, wherein Mr. Eban explained that:

> "The Israel Government attaches primary importance to the necessity, after eighteen years of ambiguity, of determining permanent and agreed national boundaries. Now this is the very heart of the Arab-Israel problem. The central issue to be negotiated in a peace settlement is the establishment of permanent boundaries. . . The position was stated with complete precision by the Prime Minister of Denmark, Mr. Krag, when he said to us in the General Assembly on June 21:
>
> 'I therefore suggest that the problem of withdrawal cannot be envisaged as an isolated step. The problem of the withdrawal of troops is clearly connected with some of the burning and sensitive problems, such as the final settlement of borders in the area and the claim of Israel, and indeed of all states in the area, for the safeguarding of their territorial and political integrity' (A/PV.1529, p.41). . . Our own region, to its disaster, has only had demarcation lines based on military conquests or military considerations. The distinction is vital. A demarcation line means vulnerability. A negotiated boundary means stability. A demarcation line means the maintenance of reciprocal territorial claims. A boundary implies their mutual and final renunciation."

Mr. Eban therefore added that

> "the suggestion that Israel should move from the cease fire lines without a peace treaty defining permanent and secure frontiers is unacceptable"[244].

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[243] Reluctance to accept this phrasing stemmed, undoubtedly, also from understanding that the 1949 armistice demarcation lines could not thus be qualified. See LALL, Arthur. *The U.N. and the Middle East Crisis, 1967.* New York and London, Colombia University Press, 1968, pp.253/4 for factual description; and see STONE, Julius. *No Peace – No War in the Middle East; legal problems of the first year.* Sydney, Maitland Publications, 1969.

[244] *S.C.O.R.*, 1375th meeting. November 13, 1967 (*U.N. Doc. S/PV.1375*).

Lord Caradon (the British representative), who sponsored resolution 242, sought to satisfy the basic demands of both Arabs and Israelis[245].

Confident, however, that the Security Council "cannot arrive at any final solution on the many questions to be dealt with, such questions for instance as these of boundaries. . ."[246], he did not insert in the draft resolution any precise alignment but, instead, sought to meet Israel's demands as to this issue[247].

The resolution, therefore, established an obligation[248] upon Israel and its neighbouring states to delimit their respective international boundaries, an obligation which was not incumbent upon them under general international law.

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[245] See *S.C.O.R.*, 1327th meeting, November 15, 1967 (*U.N. Doc. S/PV.1377*).

[246] *S.C.O.R.*, 1373rd meeting. November 9, 1967 (*U.N. Doc. S/PV.1373*, p.121.).

[247] "In the long discussions with the representatives of Arab countries, they have made it clear that they seek no more than justice. The central issue of the recovery and restitution of their territories is naturally uppermost in their minds. The issue of withdrawal to them is all-important and, of course, they seek a just settlement to end the long sufferings of the refugees.

The Israelis, on the other hand, tell us that withdrawal must never be to insecurity and hostility. . . The action to be taken must be within the framework of a permanent peace and withdrawal of force and threat and fear of violence and hostility. I have said before that these aims do not conflict; they are equal. They are both essential. There must be adequate provision in any resolution to meet them both since to attempt to pursue one without the other would be foolish and futile."

Therefore, he explained:

"we have endeavoured. . . to set out in a draft resolution what I believe will be recognized as a sincere and fair and honest attempt both to meet the joint claims of both states and also to discharge the high responsibility of this Council."

Thereupon the British representative presented his draft resolution (*U.N.Doc. S/8247*) which was later adopted *verbatim* by the Council as Resolution 242. See *S.C.O.R.*, 1379th meeting. November 16, 1967 (*U.N.Doc. S/PV.1379*).

[248] A discussion as to the legal nature of Resolution 242 falls beyond the scope of this study. On this subject see STONE, *op.cit.*, pp.23-4; LAPIDOTH, Ruth. "La résolution du Conseil de

## SECTION 4: THE LEGAL CHARACTER OF DELIMITATING DECISIONS OF THIRD PARTY, POLITICAL ORGANS AND THE CONDITIONS FOR INTERVENTION IN THIS SENSE BY SUCH ORGANS.

### A. *ANALOGY WITH ADJUDICATION*

#### i) *The Principle of res judicata*

The similarity of delimitating action by a political organ to arbitration has already been pointed out above. There is, in fact, some analogy to be found between the functions of such bodies in the present context[249].

In the strict and limited sense, however, the term "arbitration" would hardly be the right one to describe such action by political organs.

> "If the intention were to convey a common. . . conception of arbitration, namely, that which has for its object the settlement of differences between states by *judges* of their own choice and on *the basis of respect for law* (Hague Convention for the pacific settlement of disputes, dated October 18th, 1907, Article 37)",

remarked the Permanent Court of International Justice in the Boundary between Turkey and Iraq case[250],

> "then settlement of a boundary dispute which does not primarily depend on legal considerations by a political organ, which cannot be considered as a tribunal of arbitrators, and which is not considered by its constituting instrument as exercising the functions of arbitrator is not an arbitral award"[251].

Nevertheless, the Court thereby held that this fact did not prevent the League's Council from being called upon, by the mutual consent of the parties, to give a definitive and binding decision in a particular dispute. This was done, according to its judgement, in Article 3 (2) of the Treaty of Lausanne[252].

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Sécurité du 22 Novembre, 1967 au sujet du Moyen Orient" *R.G.D.I.P.*, Vol. 74 (1970), p.289, at pp.292-4; BLUM, Yehuda Z. *Secure Boundaries and Middle East Peace*. Jerusalem, Institute for Legislative Research and Comparative Law, 1971; p.63.

[249] When Hungary and Czechoslovakia requested the Council of the League of Nations to delimit the boundary between them in the region of Salgo-Tarjan (Somosujaflu), their respective delegates were asked by the Chairman of the Council, in its session of January 13th, 1923, whether the Council's action will have the value of mediation, or a recommendation or of arbitration. The delegates affirmed that their governments asked for arbitration, and the Chairman precised that "l'arbitrage signifie que la sentence est obligatoire". *L.N.O.J.*, 1923, p.209; see also Advisory Opinion No. 8, *op.cit.*, p.29; Ad.Op. No. 12, *op.cit.*, p.26.

[250] *Op.cit.*, p.26.

[251] *Op.cit.*, pp.26/7.

[252] *Loc.cit.*

Indeed, a decision by which an international boundary is to be delimited cannot but be of this nature. Otherwise the fundamental principle of stability and finality of the international boundary is rebuffed. This principle underlies the Court's *ratio decidendi* in the Turkey-Iraq frontier case. It also underlies the Court's decisions, in Advisory Opinions 8 and 9, that a decision by which a boundary is delimited is irrevocable. *Interest republicae ut sit finis litium.*

While a political organ has, in general, the possibility to revoke its previous decisions, this is not the case of the arbitrator, who definitely exhausts his decision-making power by rendering the award. But on this point further analogy can be found between the nature of the decisions of such bodies when delimitation of boundaries is the action operated. This analogy is not to be explained by the nature of the decision-making organ but, as explained above, by the particular character of its action.

In the Jaworzina affair Poland pretended that the decision of the Conference of Ambassadors of July 28, 1920, which established the boundary between the disputing states, could be revoked. Czechoslovakia contended that the Conference exhausted its powers.

On this point the Court stated that the Conference of Ambassadors had no power to revoke a previous decision[253] and explained that the decision had a final character[254].

Furthermore, when a question arose in the Court as to the effect of interpretations put on the decision by the Conference of Ambassadors itself, some two years after the date of its formulation[255], Poland requested the Court to respect this interpretation in accordance with the traditional principle *ejus est interpretare legem cujus condere*.

The Court likened the Conference to an arbitrator in this respect, and refused to admit a modification of the "clear effect" of the decision by the latter interpretation, on the ground that:

> "it is an established principle that the right of giving the authoritative interpretation of a legal rule belongs solely to the person or body who has power to modify or supress it. Now, as explained above, the Conference of Ambassadors

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[253] *Ad. Op. No. 8*, p. 10 (but when it examined the actions undertaken by the Supreme Council (i.e., its decision of September 27, 1919 to hold a plebiscite, which was changed by its resolution of July 11, 1920, to suspend the plebiscite and proceed to settle the dispute otherwise) the Court pointed out that "no doubt was raised in regard to the right of Supreme Council to go back upon its previous decisions". *Ibid.*, pp. 23/4).

[254] *Ibid.*, pp. 29/30.

[255] See *Ibid.*, p. 37.

did not retain this power after the decision of July 28th, 1920, by which it fulfilled the task entrusted to it. The Conference itself recognized this in the letters sent by its President to the Ministers of Poland and Czechoslovakia on December 6th, 1921, in which it makes the following declaration:

'Being unable to revoke a previous decision, it has decided that no modification can be made in the frontier line as defined by the decision of July 28th, failing the conclusion of a friendly agreement between the interested parties. . .'

. The duties of the Conference. had some points in common with those of an arbitrator entrusted by two states with the settlement of a frontier dispute between them. But in the absence of an express agreement between the parties, the arbitrator is not competent to interpret, still less modify, his award by revising it The decision of July 28th, which was accepted by the Polish and Czechoslovak Governments, contains no mention of an agreement of this kind"[256].

In the Monastery of Saint-Naum case the Court was requested by the Council of the League of Nations to handle an advisory opinion on the following question:

"Have the Principal Powers, by the decision of the Conference of Ambassadors of December 6th, 1922, exhausted, in regard to the frontier between Albania and the Kingdom of the Serbs, Croats and Slovenes at the Monastery of Saint-Naum, the mission, such as it has been recognized by the interested parties, which was contemplated by a unanimous Resolution of the Assembly of the League of Nations of October 2nd, 1921?"

On September 4, 1924, the Court announced its opinion[257] in which the judges were unanimous, answering the question put to the Court in the affirmative, and stating that the Principal Allied Powers had exhausted their mission. The Court referred to its advisory opinion concerning the question of Jaworzina as having stated the general legal considerations determining the nature and effect of a decision of this kind[258].

The decision of December 6th, 1922 which delimited the boundary in the disputed area having been criticised on the ground that it was based on erroneous information or adopted without regard to certain essential facts, the Court referred to its previous statements regarding the definitive character of the decisions in question, and did not feel called upon to give an opinion on the question whether such decisions – except when an express reservation to that effect has been made – can be revised in the event of the existence of an essential error being proved, or of new facts being relied on. It found, anyway, that even if revision under such conditions were admissible, such conditions

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[256] *Ibid.*, p. 37.
[257] Ad. Op. No. 9, *Op. cit.*
[258] See *Ibid.*, pp. 14/15.

were not present in the case before it. In these circumstances the Court found that there was no ground for the application for a revision of the decision of December 6th, 1922 (which was presented by Yugoslavia)[259].

ii) *Nemo debet esse judex in propria causa*

Another analogy with adjudication is the application of the rule that no one can be judge in his own cause in cases of delimitation by political organs, and this in contradiction to the rule "firmly embedded in the theory of modern International Law" that a state is entitled to be judge in its dispute with other states[260].

In advisory opinion No. 12 the Court had to answer the question whether the Council, in deciding a dispute submitted to it not by virtue of Article 15 of the Covenant but of a treaty concluded between the parties, could take a valid decision by a vote other than the unanimous vote of all states sitting at the Council's table.

Article 5 (i) of the Covenant stipulated that:

> "Except where otherwise expressly provided in this Covenant or by the terms of the present treaty, decisions at any meeting of the Assembly or of the Council shall require the agreement of all the members of the League represented at the meeting."

The Court pointed out that no exceptions to this principle were made other than those provided for in the Covenant itself and in the Peace Treaties of which it constituted the first part; that the Treaty of Lausanne was not one of these treaties and that as regards the exceptions contained in the Covenant the case before it did not fall within the scope of the second paragraph of Article 5[261]. In these circumstances, and if the letter of the Covenant was to be adopted as a sole guide, a negative answer to the above question was the only possible one[262].

The Court, however – again upon its interpretation of the parties' intention in formulating Article 3 (2) of the Treaty of Lausanne and, it is submitted, on the particular nature of the decision to be taken by the Council as operating delimitation – was of the opinion that the "decision to be taken" must be taken by a unanimous vote, the representatives of the parties taking part in the voting, but their votes not being counted in ascertaining whether there is unanimity.

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[259] See *ibid.*, p. 21.

[260] See LAUTERPACHT, Hersch. *The Development of the International Law by the Permanent Court of International Justice*. London. Longmans, Green and Co. 1934; p. 46.

[261] See *op. cit.*, p. 30.

[262] See LAUTERPACHT, *op. cit.*, pp. 47/8.

This ingenious construction, disregarding the letter of the Covenant and violently attacked as being based on very weak grounds[263] was, actually, based on the Court's conviction that:

> "from a practical standpoint, to require that the representatives of the parties should accept the Council's decision would be tantamount to giving them a right of veto enabling them to prevent any decision reached."

"This", found the Court, "would hardly be in conformity with the intention manifested in Article 3, Paragraph 2, of the Treaty of Lausanne"[264].

Indeed, when the attention of the Court was drawn to a passage in a speech made by Lord Curzon at a British-Turkish meeting which took place on January 23rd, 1923 (five months before the adoption of Article 3 during the second phase of the Lausanne Conference), in the course of which he pointed out that "Article 5 of the Covenant provides that the decision of the Council upon which the Turkish Government will be represented, will have to be unanimous, so that no decision can be arrived at without their consent", the Court found that this passage could not be used to interpret Article 3, mainly upon the conviction that:

> "assuming that a study of the preparatory work (*travaux préparatoires*) led to the conclusion that Article 3 should be interpreted as though it had been adopted subject to the condition that the Council could not arrive at any solution without the consent of the parties, the action of the Council would, in effect, be reduced to simple mediation. Now this conclusion, which would eliminate the possibility of a definite solution capable, if necessary, of replacing agreement between the parties, would be incompatible with the terms of Article 3, the interpretation of which – as indicated, both from a grammatical and logical point of view as well as from that of the role assigned to that Article in the Peace Treaty has been set out above"[265]

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[263] See VERZIJL, J.H.W. *The Jurisprudence of the World Court*. Leyden. Sijthoff. 1965; pp.53-57, wherein the author compared the Court's argumentation to "the act of a conjurer, who to the astonishment of the spectators produces all sorts of wonders from an empty box or one filled with pebbles". *Ibid.*, p.53.

[264] *Op.cit.*, p.32.

[265] *Op.cit.*, p.22.

## B. *THE PROCEDURE*

### i) *Action according to constituting instrument*

As we saw above, the Court, in Advisory Opinion No. 12, while applying the maxim that no one is judge in his own case, availed itself of the principle of effectiveness in order to justify the rule of qualified unanimity. The Court therein stated that "only if the decisions of the Council have the support of the unanimous consent of the powers composing it, will they possess the degree of authority which they must have"[266].

This ruling, as pointed out by Verzijl[267] is indeed inconsistent with the Court's interpretation of the parties' intention in formulating Article 3 (2) of the Treaty of Lausanne. It would have been much more consistent with this interpretation if the Court declared a majority decision of the Council admissible.

> "Otherwise under certain circumstances it would remain impossible by this means to *'fixer'* or to *'déterminer'* the boundary, which would be contrary to "the nature of a boundary" and would frustrate a *'décision dont dépendra le sort définitif des territoires'* (according to Article 3, Sub. 2, Para. 3)"[268].

The Court's ruling in this case was, however, in perfect consistency with its previous statement in Advisory Opinion No. 8, wherein it advised that "every decision" (in the present context) "must be taken by the Conference of Ambassadors, that is to say, with the unanimous consent of the powers represented therein. This circumstance constitutes an important guarantee for the states to whom territories were allocated by the decision of July 28th, 1922"[269].

Whereas, however, the Conference of Ambassadors was a purely political organ of a temporary nature, and, as such, naturally had to pronounce unanimously, in the League of Nations (as in any other instituted organ) the rules proper to such an organ, as established in its constituting instruments, apply. Such was the intention of the Court in Advisory Opinion No. 12[270].

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[266] *Op.cit.*, p.29.
[267] *Op.cit.*, pp.54/55.
[268] *Loc.cit.*
[269] *Op.cit.*, pp.30-31.
[270] *Op.cit.*, p.31.

ii) *Action According to Special Agreement*

In advisory opinion No.12 the Court declared that "no one denies that the Council can undertake to give decisions by a majority in specific cases, if express provision is made for this power by treaty stipulation"[271]. This statement is irreconcilable with the clear language of Article 5 of the League's Covenant.

In this respect the above pronouncement of the Court resembles its statement, in the same case, that the Council's normal power, which, according to Article 15 of the Covenant, is confined to recommendations only, may be converted into an award by the consent of the parties[272].

Indeed, as was pointed out by Q. Wright[273], international institutions (in contradistinction from national institutions) generally accommodate themselves to special agreements by the parties, whereas the powers and procedures of national institutions are established by general law and can be changed only by general legislation, so that it would not be considered proper for a national Court or parliament to extend its competence or modify its procedure because two or more individuals had made a contract requesting it to do so with respect to a controversy between them. The Court's decision in the case herein under review apparently flows from this consideration, the impact of which in the context of the present study may be considerable in cases where the political organ's action is based on a special competence.

C. *SUMMARY*

The French jurist Georges Scelle in a remarkable essay, in which he specifically dealt with the Conference of Ambassadors and its competence to delimit international boundaries[274] – exposed a theory, based on what he found a "social necessity", of a "*gouvernement de fait international*"; a theory diametrically opposed to the traditional, ever-present doctrine of state sovereignty.

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[271] *Op.cit.*, p.30.

[272] *Op.cit.*, pp.27/8.

[273] WRIGHT, Quincy. "The Mosul Dispute". *A.J.I.L.*, Vol.20, (1946), p.453, at p.457.

[274] SCELLE, Georges. "La situation juridique de Vilna et de son territoire". *R.G.D.I.P.*, Vol. 35, 1928, p.730.

At the time this Article appeared (1925), an affirmation like his, that

> "Il importe peu de rechercher si tel ou tel gouvernement particulier a ou non reconnu les pouvoirs ou accepté les décisions d'un gouvernement de fait international"[275]

could be sustained, insofar as delimitation of international boundaries was the matter concerned. The practice of the Big Powers during the 19th century and up to the First World War somehow conformed with this statement.

The opposite tendency, however, began to manifest itself in the elaboration of the Peace Treaties subsequent to World War I, inasmuch as the assent of directly interested parties was always sought and emphasized as the basis for competence of organs constituted by the Big Powers to operate delimitations.

The evolution thereafter was constantly in the same direction and, as we have seen, this tendency has been especially clear since 1945.

Indeed, in an ever-enlarging international community, with so many states which have just emerged from colonial tutelage, the principle of "sovereign equality" of states, emphatically declared as one of the bases of the United Nations Organization, is bound to find expression in matters as sacred as those concerning the national soil, such as delimitation of boundaries.

Conformingly, action in the United Nations had been confined to promotive activity in view of delimitation and has been innovative inasmuch as the facultative nature of delimitation was rebuffed. This activity, however, went no further to interfere with the substance of delimitation problems.

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[275] *Ibid.*, p.767.

## CHAPTER THREE

## DELIMITATION BY ADJUDICATION

*PREFATORY*

The following essay proposes to elucidate some problems *sui generis* of delimitation by adjudication, rooted in the intrinsic nature of the operation. It also proposes to explain the function of arbitration delimitation and its defects. The latter investigation, however, does not always treat problems which arise exclusively in the context of delimitation.

Section I explains the title of this chapter. This is important in order to differentiate delimitating from other kinds of boundary adjudications.

Section 2 relates to constituted courts of law and expounds the difficulties encountered by such organs, difficulties due to the lack of substantial, materially applicable rules governing the matter of delimitation.

Section 3 shows how the same difficulties have been overcome in *ad hoc* arbitration, explains the machinery of delimitation arbitration and the shortcomings of this procedure.

### SECTION 1: SCOPE OF THE CONCEPT

In the Southern Boundary of Walfisch Bay Arbitration[1], the arbitrator adopted a unilaterally demarcated boundary as the boundary line between German and British Colonial possessions in *South-West* Africa. So doing, the arbitrator effectively delimited the said boundary; indeed, it was stressed in the award that

> "The said demarcation. . . must be accepted in future, by virtue of this arbitral award, as the exact definition of the frontier under discussion"[2].

[1] *B.F.S.P.*, Vol. 104, p. 50; *U.N.R.I.A.A.*, Vol. XI, pp. 263-308; MARTENS, *N.R.G.*, 3e. sér., Vol. 6, p. 296; and see *supra*, Chapter One, Section 1, C.

[2] See MARTENS, *op. cit.*, p. 446.

The arbitrator thus indicated the constitutive character of his decision. In fact, it is over this point that the distinction should be drawn between adjudications by which delimitations are operated and other kinds of boundary adjudications[3]. A decision operating delimitation is only that decision which constitutes a boundary.

As Lapradelle[4] pointed out, most boundary adjudications were restricted to interpretation of boundary treaties "qu'il s'agisse d'une question de texte, ou d'une question de validité du traité"[5]. Such adjudications are of no interest to us. The distinction between a declarative, interpreting decision and a genuine delimitation operating adjudication might, however, be difficult to draw.

Thus, by the Convention of Washington, March 17, 1910[6] Costa Rica and Panama recited that

> "although they consider that the boundary between their respective territories designated by the arbitral award of his Excellency the President of the French Republic the 11th of September 1900, is clear and indisputable in the region of the Pacific" they "have not been able to reach an agreement in respect to the interpretation which aught to be given to the arbitral award as to the rest of the boundary line."

Both states therefore agreed to submit to the decision of the Chief Justice of the United States for determination, as arbitrator, of the question:

> "What is the boundary between Costa Rica and Panama under and most in accordance with the correct interpretation and true intention of the award of the President of the French Republic made the 11th of September, 1900?"[7]

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[3] LAPRADELLE's pronouncement (*La Frontiére*, p. 143), according to which

"Semblable au jugement interne rendue en matière de bornage, la décision arbitrale internationale, en matière de différend de limite, est déclarative, non constitutive de droits"

refers to territorial rights and is correct, for delimitation does not constitute rights, but lines. As eloquently explained by RENAULT, Louis DE LAPRADELLE, A. and POLITIS, N. in their essay entitled "De l'influence sur la procédure Arbitrale de la cession de droits litigieux" (*R.G.D.I.P.*, Vol. 13 (1906), p. 309, at p. 319):

> "La mission de l'arbitre est de vérifier une ligne. L'arbitre ne statue pas sur le partage d'une masse territorial considérée comme superficie, mais sur l'identité d'une frontiére considérée comme ligne. La sentence ne porte pas directement sur une quantité, mais, directement, sur une identité. La quantité est susceptible de plus ou de moins. L'identité n'est susceptible que d'être ou de ne pas être. Une ligne peut être autre, elle ne peut pas être moindre. Une masse est divisible, une frontiëre ne l'est pas".

[4] *La Frontière*, p. 127.

[5] And see his appended list, *ibid*, p. 362.

[6] MARTENS, *N.R.G.*, 3e. Sér., Vol. 3, p. 678; *A.J.I.L.*, Vol. 6 (1912), Supplement, p. I, *B.F.S.P.*, Vol. 103, p. 404.

[7] Article I.

The arbitral award in question, rendered by President Emile Loubet of France, defined the boundary between Costa Rica and Colombia, apparently according to the *compromis d'arbitrage*; i.e., within the zone described in it [8].

Since 1907, however, Costa Rica considered this award invalid, insisting that it was void, the Loubet line lying in part outside the bounds of the disputed territory. It demanded, therefore, that the whole line should be considered anew, whereas Panama claimed that the only issue was the legality of the Loubet line within the scope of the authority of the Arbitration Convention[9].

Through the mediation of the United States[10], the above referred to Arbitration Convention of Washington, March 17, 1910 was signed between the contending states. It should be noted, however, that the intention was expressed on the part of U.S. authorities[11] not to limit the boundary issue to the mere interpretation of the Loubet award, the United States government estimating that the real issue to be submitted to arbitration was the true boundary line.

In these circumstances E. Douglass White, Chief Justice of the United States rendered an award, on September 12, 1914[12], in which he found that "the line of boundary fixed by the previous award from Punta Mona to the Cordilleras was not within the mater in dispute" or within the territory in dispute before the French President; that, therefore, this award was beyond the submission; that the arbitrator was without power to make it and that "it must therefore be set aside and treated as non existing"[13].

To the question he thereupon asked himself, namely "what in other respects is the duty arising under the present arbitration from the situation?", the arbitrator replied that it was conceded by both parties that under this treaty there was the power and duty to substitute for the line set aside, a line within the scope of the authority granted under the previous treaty "most in accordance with the correct interpretation and true intention of the former award"[14]. Accordingly, he purported to so delimit the boundary[15].

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[8] See MARTENS, *N.R.G.*. 2e.sér., Vol. 32, p. 53; *B.F.S.P.*. Vol. 92, p. 1038; *U.S. For Rel.*. 1910, p. 786.
[9] See MARTENS, *N.R.G.*, 2e.sér., Vol. 32, p. 383; *ibid.*, Vol. 25, p.62.
[10] See IRELAND, *Boundaries, Possessions and Conflicts in Central and North America and the Carribean.*, *Op. cit.*, p. 34 ff.
[11] See *U.S. For. Rel.*, 1910, p. 804.
[12] See *A.J.I.L.*, Vol. 8 (1914), p. 913; *B.F.S.P.*, Vol. 108, p. 439; *U.S. For. Rel.*, 1914, p. 10000.
[13] *A.J.I.L.*, *ibid.*, p. 935.
[14] *Ibid.*, p. 939;
[15] *Ibid.*, p. 941.

Considering the arbitration compromise, the validity of this decision is doubtful, for the arbitrator was asked not merely to decide "in accordance with the correct interpretation and true intention" of the Loubet award, but also expressly directed to inform the parties of the boundary between them "under" this award; i.e., his decision had to have a declarative character in this respect. Indeed, on October 17, 1914, the Foreign Minister of Panama wrote his Costa Rican colleague that Panama thought that the arbitrator had exceeded the terms of the arbitration and had "made a real revision of the Loubet award instead of the interpretation called for by the Arbitral Convention, and had fixed a frontier line totally strange to the former award", for which reason the White award was null under International Law, and Panama did not consider herself obliged to comply with it[16].

Another case in point relates to delimitation of the boundary between Guatemala and Honduras.

Through the mediation of the United States[17], both states, on July 16, 1920, signed the Treaty of Washington[18]. By the terms of Article I of this treaty the two governments established a special Boundary Tribunal to take cognizance of the boundary dispute they maintained.

Article 5 stipulated that:

> "The High Contracting Parties are in agreement that the only Juridical line which can be established between their respective Countries is that of the '*Uti Possidetis*' of 1821. Consequently, they are in accord that the Tribunal shall determine that line".

In its award, handed down on January 23, 1933[19], the Tribunal was confronted with the question whether its power to fix a definitive line through the entire disputed area was conditioned on the prior determination of a complete line of '*uti possidetis*', as Article 5 of the arbitration agreement seemed to stipulate.

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[16] See *U.S. For. Rel.*, 1914, pp. 993-1028; 1915, pp. 1131-1155.

[17] See *supra*, Chapter Two, Section 1, A (i).

[18] *L.N.T.S.*, Vol. 137 (1933), p. 372; MARTENS, *N.R.G.*, 3e. sér., Vol. 3, p. 365; *B.F.S.P.*, Vol. 132, p. 823.

[19] See *Opinion and Award of the Special Boundary Tribunal Constituted by the Treaty of July 16, 1920, between the Republics of Guatemala and Honduras.* Washington D.C., January 1933; *L.N.O.J.*, 1933, p. 620; *A.J.I.L.*, Vol. 27 (1933), pp. 313, 403, 403-427.

Upon the wording of Article 5, which authorized the Tribunal, in establishing a definitive boundary, not to follow the line of '*uti possidetis*' if it should be found that either or both of the litigant countries, in their development after 1821, had "established beyond that line, interests which should be taken into account. . ." and, as was mentioned above[20] in the light of its declarations on the purpose of the Washington Treaty that the award "should decide the boundary controversy finally", the Tribunal reached the conclusion that:

> "the Treaty must be construed as empowering the Tribunal to determine the definitive boundary as justice may require throughout the entire area in controversy, to the end that the question of territorial boundaries may be firmly and amicably settled"[21].

The Tribunal thereabout proceeded to delimit the boundary[22]. The parties thereafter accepted the award, albeit its questionable constitutive character. Indeed, Article 5 having charged the Tribunal to determine the '*uti possidetis*' line (and not the boundary line) the Tribunal was, apparently, invested with a power to pronounce a declarative decision exclusively. Having been unable to determine the line of '*uti possidetis*' of 1821 it could have concluded with a *non liquet.*

## SECTION 2: CONSTITUTED COURTS AND DELIMITATION

### A. *THE DILEMMA*

As the Permanent Court of International Justice said in its order of 19 August, 1929 in the case of the Free Zones of Upper Savoy and the District of Gex[23] the Judicial settlement of international disputes "is simply an alternative to the direct and friendly settlement of such disputes between the parties". Indeed, as F. Eustach[24] pointed out

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[20] *Supra*, Introduction, B (3).

[21] See Opinion and Award, *op. cit.*, p. 69.

[22] See *L.N.T.S.*, Vol. 137 (1933), p. 239.

[23] *P.C.I.J.*, Series A, No. 22, at p. 13.

[24] EUSTACHE, François. "L'affaire du plateau continental de la mer du nord devant la Cour Internationale de Justice". *R.G.D.I.P.*, Vol. 74, (1970), p. 591.

"C'est un principe établie du contentieux international que le recours au juge, témoignage des excellents rapports qui existent entre les Parties au litige, constitue l'ultima ratio"[25].

In the North Sea Continental Shelf Cases[26], the acknowledgement of this necessity led the Court to a critical appreciation of the way negotiations were conducted between the contending states prior to submission to the Court of the question pending between them, as well as of the purpose of these negotiations[27], the Court stating that "fresh negotiations are to be taken on the basis of the present judgement"[28].

After negotiations, separately held between the German Federal Republic on the one side, and the Netherlands and Denmark on the other, had in each case failed to result in any agreement about the delimitation of the boundary extending beyond a partial one – previously agreed upon between the Federal German Republic and the Netherlands[29] and the first-mentioned state and Denmark [30]– tripartite talks among all the parties took place. These also proving fruitless, it was then decided to submit the matter to the Court.

In these circumstances, two special agreements (a German-Danish *compromis* and a German-Dutch *compromis*) were signed, on February 1967. Each of these special agreements requested the Court to decide the following question:

"What Principles and Rules of International Law are applicable to the delimitation as between the Parties of the areas of the Continental Shelf in the North Sea which appertain to each of them beyond the partial boundary. . ."[31].

The parties also undertook therein to delimit the boundary in question by agreement in pursuance of the Court's decision[32].

In its judgement the Court ruled, at least by implication, that no substantial mandatory rule applies to delimitation of Continental Shelf areas by virtue of General International Law; i.e., when all states involved

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[25] *Ibid.*, p. 623.
[26] *I.C.J. Reports*, 1969, p. I.
[27] See *ibid.*, pp. 47/8.
[28] *Loc. cit.*
[29] See *ibid.*, *Pleadings*, Vol. I, pp. 98, 102.
[30] *Ibid.*, pp. 109, 112, 114.
[31] *Op. cit.*, p. I.
[32] *Loc. cit.*

are not bound by Article 6, paragraph 2 of the 1958 Geneva Convention on the Continental Shelf[33].

The Court was, henceforward, on the horns of a dilemma, stemming from the fact that determination of lateral international boundaries in the Continental Shelf (and of international boundaries in general) is not a justiciable question in General International Law, in the sense that no substantial legal rules are applicable to its resolution.

The Court could either conclude in a *non liquet* or render a subjective, distributive judgement. In fact, it seems to have been somewhat tempted by this second possibility, as the following passage demonstrates: "As the operation of delimitation is a matter of determining areas appertaining to different Jurisdictions" remarked the Court in disregard of its previous statements[34].

> "It is a truism to say that the determination must be equitable; rather is the problem above all one of defining the means whereby the delimitation can be carried out in such a manner as to be recognized as equitable"[35].

Respecting, however, the terms of the Special Agreement and of the stipulations of its Statute the Court pointed out that it

> "is not called upon itself to delimit the areas of the Continental Shelf appertaining to each Party, and in consequence is not bound to precise the methods to be employed for the purposes of such a delimitation". But that, instead "The Court has to indicate to the Parties the principles and rules of law in the light of which the methods for eventually effecting the delimitation will have to be chosen" and that, therefore, "The Court will discharge this task in such a way as to provide the Parties with the requisite directions, without substituting itself for them by means of a detailed indication of the methods to be followed and the factors to be taken into account for the purposes of a delimitation the carrying out of which the Parties have expressly reserved to themselves"[36].

The Court, thus, had chosen a third alternative, consisting of a ruling that the states concerned must reach an agreement on the shelf boundaries and supplying them with guidelines to serve them as starting points for these negotiations.

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[33] See *supra*, Chapter Four, Section 3, B (iii).

[34] See *op. cit.*, pp. 21, 22.

[35] *Op. cit.*, p. 50.

[36] *Op. cit.*, p. 47.

The application of these guidelines is facultative:

> "In fact" said the Court "there is no legal limit to the considerations which states may take account of for the purpose of making sure that they apply equitable procedures, and more often than not it is the balancing-up of all such considerations that will produce this result rather than reliance on one to the exclusion of all others. The problem of the relative weight to be accorded to the different considerations naturally varies with the circumstances of the case"[37].

Indeed, these "factors" enumerated by the Court were termed by Judge Koretsky, in his dissenting opinion, as "economico-political in nature" rather than principles of law[38].

Likewise, the two basic legal notions the Court found to have reflected from the beginning the *opinio juris* in the matter of delimitations, namely "that delimitation must be the object of agreement between the states concerned and that such agreement must be arrived at in accordance with equitable principles"[39] do not provide any practical method for the drawing of boundary lines. "Equity" in this respect is the goal to be achieved, not the means to reach it.

The Court, thus rejecting any reglementation *ex aequo et bono*, but finding in "equity" the remedy to its difficulties, did not set forth any substantial imperative rules for delimitation. Indeed, as Judge Tanaka, in his dissenting opinion[40], observed, the call for superior notions of law like justice, equity and reason, evident in themselves, cannot, because of the general and abstract nature of such notions, furnish any precise criterion for delimitation.

Summing up, it seems impossible, as Judge Kellog pointed out in the Free Zones case[41], to avoid the conclusion that the Court is competent only to decide questions susceptible of receiving a solution by the application of legal rules and principles.

The Court, considering that "the international law of the Continental Shelf delimitation does not involve any imperative rule and permits resort to various principles or methods, as may be appropriate, or a combination of them" could go no further than to instruct the parties to arrive at "a reasonable result" "by the application of equitable principles"[42].

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[37] *Op. cit.*, p. 47
[38] See *op. cit.*, p. 168.
[39] *Op. cit.*, p. 47.
[40] *Op. cit.*, p. 195/6.
[41] *Op. cit.*, p. 38.
[42] *Op. cit.*, p. 50.

The Court did not consider, as did Judge Fouad Ammoun, in his separate opinion[43], that there is a *laçuna* in international law when delimitation is not provided for either by an applicable general convention (Article 38, paragraph I (a) of the Statute), or by a general or regional custom (Article 38, paragraph I (b)). Indeed, the judgement stresses the point that delimitation is not a legal necessity, but only a facultative operation[44]. Accordingly, the Court did not find it necesssary, as did the Judge mentioned, to apply equity *praeter legem* to fill a hypothetical gap by pointing out some rule "to the effect that the Continental Shelf could, in case of disagreement, be delimited equitably between the Parties"[45].

Instead, the Court insisted on the freedom of the parties to "agree upon one method rather than another, or different methods if they so prefer". Stemming from the facultative nature of delimitation in itself, the choice of a method for operating it is also facultative. Indeed, the present author adheres to Judge Koretsky's statement in his dissenting opinion, to the effect that:

> "Provided there is no encroachment on the sphere of the sovereign rights of any other state, parties are free to agree on whatever terms they wish for the delimitation of boundaries, bearing in mind, generally, both legal and non-legal arguments: relevant political and economic factors, related considerations of security and topography, the relations ("good-neighbourly" or otherwise) between the states concerned, and whatever imponderables may escape hard and fast classification"[46].

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[43] *Op. cit.*, p. 132.

[44] *Op. cit.*, p. 32.

[45] *Op. cit.*, p. 132; Judge Ammoun, pointing out that

> "to refer the parties to the negotiation of an agreement which would attribute to each of them an equitable share of the Continental shelf is not to determine the principles and rules applicable to the delimitation of the areas of the Continental Shelf, which are referred to in the special agreement", submitting that "a decision limited in this way would amount to the determining of the objective aimed at, without any mention of the means of attaining them"

(*op. cit*, p. 145) and expressing a very liberal conception of the Court's functions (*loc. cit*) proceeded to formulate a precise, geometrical method for delimitation (*op. cit.* pp. 151-4).

[46] *Op. cit.*, p. 155.

B. *THE PRACTICE*

In the present context, the question of the justiciable or non-justiciable nature of a case is of capital importance.

With no imperative legal rules regulating the matter of delimitation, a court of law, the function of which is to decide disputes submitted to it "in accordance with international law" (Statute, Article 36, paragraph I) and which can not, as Judge Kellog observed in the Free Zones case[47] "decide questions upon grounds of political and economical expediency", will always be presented with the above *argumentum cornutum* unless requested by the parties to render a decision *ex aequo et bono* or, probably, by virtue of Article 38, paragraph I (a) of its Statute (which mentions "particular" international conventions) to adjudicate on a basis agreed upon by the parties[48].

Such functions are, however, better suited for *ad hoc* tribunals to discharge and, indeed, it seems that states are averse to resorting to such procedures before a constituted court. The International Court was, therefore, never requested to render a decision by which an international boundary would be delimited.

Thus, the Permanent Court of International Justice, in the three cases in which it came to deal with questions relating to our subject (Advisory opinions No. 8, 9, 12) was not asked to delimit boundaries, but only to render advisory opinions[49]. The Court restricted itself to the questions submitted to it, and did not determine any boundary line.

The International Court of Justice dealt with boundaries, directly or indirectly, in the case concerning sovereignty over certain Frontier Lands[50], in the case concerning the Arbitral Award made by the King of Spain[51], in

[47] *Op. cit.*, p. 34.

[48] See JENKS, Wilfred C. *The Prospects of International Adjudication.* London. Stevens and Sons. 1964; pp. 604-616.

[49] Whereas the Conference of Ambassadors asked the League of Nations, in connection to the question of Albania's boundaries, not only if it had exhausted its mission by its decision of December 6th, 1923 but also, if the answer was negative, to point to it the solution to be adopted in regard to the boundary question (See Ad. Op No. 3 *op. cit.*, pp. 11/12) this second request was completely ommited from the question the Council of the League of Nations put to the Permanent Court of International Justice for Advisory Opinion (see *op. cit.*, pp. 6/7).

[50] *I.C.J. Reports*, 1959, p. 210.

[51] *I C.J. Reports*, 1960, p. 191.

the Temple of Preah Vihear case[52] and in the North Sea Continental Shelf cases[53]. In none of these cases did the Court render a decision which could be considered constitutive in the present respect.

In the first and third above-enumerated cases, the Court found where the boundary lay by virtue of acts and instruments of the contending parties and, accordingly, answered the questions put to it; i.e., to whom belonged the territorial sovereignty in the disputed districts. As the Court made clear in the Temple case[54],

> "the subject of the dispute submitted to the Court is confined to a difference of view about sovereignty over the region of the Temple of Preah Vihear. To decide this question of territorial sovereignty, the Court must have regard to the frontier line between the two states in this sector"[55].

In the case concerning the Arbitral Award made by the King of Spain, the Court was asked by the parties to decide upon the validity of an arbitral award which delimited the boundary between the disputing states. The decision, that the award in question was binding, had a declarative effect in the present context.

In the Continental Shelf cases the Court stated in its judgement that "there is. . . no question in this case of any decision *ex aequo et bono*"[56] and indeed, as we have seen above, restricted itself to a consultative kind of judgement, in such a way that Judge Tanaka, in his dissenting opinion, felt that "the Court's answer amounts to the suggestion to the parties that they settle their disputes by negotiations according to *ex aequo bono*"[57]. Undoubtedly, the direct and decisive operation of delimitation is difficult for the International Court to perform.

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[52] *I.C.J. Reports*, 1962 p. 6.

[53] *I.C.J. Reports*, 1969, p. I.

[54] *Op. cit.*, p. 14.

[55] The Court made it clear, in its conclusions, that Cambodia's first and second submissions, calling for pronouncements on the legal status of the Annex I map and on the frontier line in the disputed region (*op. cit.*, pp. 10/11).

> "can be entertained only to the extent that they give expression to grounds, and not as claims to be dealt with in the operative provisions of the judgement" (*op. cit.*, p. 36)

[56] Paragraph 88.

[57] *Op. cit.*, p. 196.

## SECTION 3: DELIMITATION BY ARBITRATION

Due to its flexible nature, *ad hoc* arbitration is a suitable procedure for boundary delimitation. It had, therefore, quite frequently been used, up to the Second World War, for this purpose. Indeed, out of some 70 boundary arbitrations which occurred throughout the 19th century and up to 1938, 19 were delimitation-operating arbitrations[58].

It is superfluous, therefore, to conclude, as does Lapradelle[59] that "l'arbitrage directe est rare". It could rather be acknowledged that what he terms "subsidiary arbitration" i.e., those cases of arbitration caused by imprecision of previous delimitations, and confined to interpretation, was resorted to much more frequently.

Whether occurring on the occasion of a territorial distribution as a secondary operation, or as the principal operation[60], delimitation by arbitration is not an exceptional phenomenon. Indeed, the freedom of the parties to choose the arbitrators and to agree upon the rules to be applied by the Tribunal assures considerable political flexibility to this procedure, hence favorising its adoption by disputing states.

### A. *TASK OF THE TRIBUNAL*

#### i) *Delimitation as Result of Partition*

As mentioned above, an arbitral Tribunal might be asked by the parties, on the occasion of a territorial partition, to delimit the boundary, delimitation appearing as a subsidiary operation.

Thus, by the Treaty of London, November 6, 1901[61], the governments of Brazil and Great Britain resolved to submit to arbitration the questions concerning the boundary between Brazil and the Colony of British Guiana.

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[58] See STUYT, A. M *Survey of International Arbitrations, 1794-1938*. The Hague. Martinus Nijhof, 1939; VERZIJL, *op. cit.*, Vol. III, pp. 612-618.

[59] *La Frontière*, p. 127.

[60] See LAPRADELLE, *ibid.*, pp. 141/2.

[61] MARTENS, *N.R.G.*, 2e. sér., Vol. 32, p. 413.

By the terms of Article 3 of this Treaty the arbitrator was requested

> "to investigate and ascertain the extent of the territory which. . . may lawfully be claimed by either of the High Contracting Parties, and to determine the boundary line between the United States of Brazil and the Colony British Guiana".

The award of King Victor Emmanuel III, of Italy, which was rendered on June 6, 1904, duly delimited the boundary between British Guiana and Brazil[62].

Alternatively, the territorial issue may appear in the *compromis* in the form of a directive to the Tribunal, the principal aim of the parties appearing to be territorial distribution rather than boundary delimitation.

Thus, by the treaty of Caracas, September 14, 1881[63], Colombia and Venezuela submitted:

> "to the Judgement and decision of the Government of His Majesty the King of Spain, in the capacity of Arbitrator or Umpire, the points of difference in the. . . question of boundaries, in order to obtain a definitive decision, not admitting of any appeal, in accordance with which all the territory appertaining to the Jurisdiction of the ancient Captainty General of Caracas, by Royal Decrees of the ancient Sovereign down to 1810, shall constitute the territorial jurisdiction of the Republic of Venezuela, and all that territory which by similar Decrees and at that date belonged to the Vice Royalty of Santa Fé, constituting the existing Republic called the United States of Colombia"[64].

Likewise, Bolivia and Perú, by Article I of the Treaty of La Paz, December 30, 1902[65] submitted to arbitration.

> . . . "the question of limits now pending between both Republics, so as to obtain a definitive and unappealable sentence, in virtue of which all the territory which in 1810 belonged to the Jurisdiction or district of the ancient Audience of Caracas, within the limits of the Viceroyalty of Buenos-Aires, by acts of the ancient Sovereign, may belong to the Republic of Bolivia, and all the territory which at the same date and by acts of equal origin belonged to the Viceroyalty of Peru will belong to the Republic of Peru"[66].

In yet another category of cases, the Tribunal is requested to delimit the boundary within a prescribed zone, the operation resembling partition as well as delimitation.

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[62] See MARTENS, *ibid.*, p. 485.

[63] *B.F.S.P.*, Vol. 77, p. 1012.

[64] For the award rendered on March 16, 1891, by which the boundary was delimited see MARTENS, *N.R.G.*, 2e. sér., Vol. 24, p. 110.

[65] MARTENS, *ibid.*, 3e. sér., Vol. 3, p. 50; B.F.S.P., Vol. 100, p. 803.

[66] For the award rendered by J. Figueroa Alcoa, President of the Argentine Republic, on July 9,

Thus, in the Convention of Paris, signed on January 20, 1886 between Colombia and Costa Rica[67], the parties, in Article 2, described the territorial limits of their claims, and stipulated (Article 3) that "the case for arbitration shall be restricted to the disputed territory contained within the extreme limits here described. . ."[68].

Likewise, the Treaty of Peace, Friendship and Boundaries, signed between Bolivia and Paraguay in Buenos Aires on July 21, 1938[69] stipulated that the arbitral Tribunal should fix the Northern and the Western dividing lines in the disputed Chaco region within the zones therein described[70].

ii) *Delimitation by Identification*

In the delimitation arbitration proper the operation is not aimed at attributing territory, but at identifying a line.

In some cases, the arbitrator is called to choose between two different alignments, respectively claimed by the parties.

Thus, in the Convention of Bern, December 31, 1871, between Italy and Switzerland[71] both parties claimed different boundary lines and appointed arbitrators to fix definitively the boundary line separating their territories in the Caravairola Alp region by adopting one of the two indicated alignments. In the award, rendered on September 23, 1874[72] the Tribunal adopted the alignment proposed by Italy. A Protocol was thereafter signed, on May 17, 1875, to carry this award into effect[73].

Likewise, Article 5 of the Treaty of Buenos Aires, September 7, 1889, between the Argentine Republic and Brazil[74] stipulated that:

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1909, see MARTENS, *ibid.*, p. 53; *A.J.I.L.*, Vol. 3 (1909), p. 1029; *ibid.*, p. 949.

[67] MARTENS, *N.R.G.*, 3e. sér., Vol. 32, p. 383; *ibid.*, Vol. 25, p. 62.

[68] As mentioned above, the conformity of the award rendered by President Loubet of France on September 11, 1900 with this stipulation was the core of the contention as to the validity of this award.

[69] *A.J.I.L.*, Official Documents, 1938, p. 139.

[70] *Ibid.*, Article 2, Paragraphs a,b; for the award see *A.J.I.L.*, Vol. 33, (1939), p. 180.

[71] MARTENS, *N.R.G.*, Vol. 20, p. 214.

[72] See MOORE, *International Arbitrations*, Vol. 2, p. 2028, MARTENS, *N.R.G.*, 2e. sér., Vol. 8, p. 560.

[73] See MOORE, *ibid.*, p. 2049.

[74] See MOORE, *ibid.*, Vol. 5, p. 4088; *B.F.S.P.*, Vol. 81, p. 254; *U.S. For. Rel.*, 1892, p. 2.

"The frontier shall be constituted by the rivers which Brazil or the Argentine Republic have designated, and the Arbitrator shall be invited to pronounce in favour of one or the other of the parties as he may consider just after due investigation of the reasons and documents produced".

The award rendered on February 5, 1895[75] by President Grover Cleaveland of the United States of America established the alignment designated by Brazil as the boundary.

In a similar case, the arbitrator was endowed with a larger discretionary power.

By the Arbitration Convention signed at Paris, November 29, 1888[76], France and the Netherlands "Voulant mettre fin a l'amiable du différend qui existe touchant les limites de leurs Colonies respectives de la Guayane Française et de Surinam, en amont du confluent des riviers de l'Awa et du Tapamahoni" instructed the arbitrator to choose the boundary as one of the rivers mentioned and claimed by them, respectively.

By an additional Convention[77], however, both governments "désireux d'assurer promptement l'arrangement final du litige" agreed to accord to the designated arbitrator

"le pouvoir subsidiaire d'adopter et de fixer éventuellement, comme solution intermédiaire, une autre limite sur l'étendue du territoire contesté, pour le cas ou il ne parviendrait pas, après examen du différend, à fixer comme frontière une des deux riviers mentionnées dans la Convention précitée".

In his award, rendered on May 25, 1891[78], Czar Alexander III, the arbitrator, made no use of this supplementary discretionary power and adopted the alignment proposed by the Netherlands as the boundary.

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[75] MOORE, *ibid.*, Vol. 2, p. 2020; *B.F.S.P.*, Vol. 87, p. 697; *U.S. For. Rel.*, 1895, p. I.

[76] MARTENS, *N.R.G.*, 2e. sér., Vol. 16, p. 730; *B.F.S.P.*, Vol. 79, p. 795.

[77] Convention of Paris, April 28, 1892, *B.F.S.P.*, Vol. 82, p. 1018.

[78] See MARTENS, *N.R.G.*, 2e. sér., Vol. 18, p. 104; MOORE, Vol. 5, p. 4869.

iii) *Action* ex aequo et bono

In some arbitrations, the arbitrator was endowed by the parties with full powers to define the boundary according to his appreciation.

Thus, Ecuador and Peru, by the Convention of Quito, August 1, 1887[79], "wishing to settle amicably the question of limits pending between the two nations" submitted "the said questions to His Majesty the King of Spain, in order that he may settle them, as rightful arbitrator, in a definitive way and without appeal"[80]. (No award was rendered on this occasion. The King of Spain, by cable of November 24, 1910, 23 years after acceptance of the task, withdrew from the arbitration and declined to issue a decision).

Similarly, the Peace Treaty of Sèvres, August 10, 1920[81], recorded (Article 89) that:

> "Turkey and Armenia as well as the other High Contracting Parties agree to submit to the arbitration of the President of the United States of America the question of the frontier to be fixed between Turkey and Armenia in the Vilayets of Erzerum, Trebizand, and Bitlis, and to accept his decision thereupon".

President Woodrow Wilson rendered his award, in which he duly delimited the boundary, on November 22, 1920[82].

With regard to the lack of mandatory rules regulating delimitation by virtue of general international law the parties, in case they do not formulate any conventional rules to the attention of the arbitrator charged with the task of operating delimitation, may well authorize the Tribunal to act *ex aequo et bono*, as was done in relation to the Chaco dispute between Bolivia and Paraguay, settled by arbitration in 1938[83].

In fact, Article 2 of the Treaty of Peace, Friendship and Boundaries, signed at Buenos Aires on July 21, 1938[84] provided that:

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[79] *B.F.S.P.*, Vol. 78, p. 47.

[80] Article 1.

[81] *A.J.I.L.*, Official Documents, 1921, p. 179; MARTENS, *N.R.G.*, 3e. sér., Vol. 12, p. 664; *B.F.S.P.*, Vol. 113, p. 652.

[82] See *Bulletin de l'Institut Juridique International.* Harlem. H. B. Tjeenk Willink. 1914-1940; Vol. 31, p. 329.

[83] See *supra*, Chapter Two, Section 1, A (i).

[84] *A.J.I.L.*, Official Documents, 1938, p. 139.

> "The dividing line in the Chaco between Bolivia and Paraguay will be that determined by the Presidents of the Republics of Argentina, Chile, United States of America, United States of Brazil, Peru and Uruguay in their capacity as arbitrators in equity, who deciding *ex aequo et bono* will give their arbitral award. . ".

In their decision[85], the arbitrators pointed out that they were to act *ex aequo et bono*. After examination of the antecedents accumulated by the Chaco peace conference, as well as the needs of the parties with regard to their mutual security and geographical and economic necessities, and the opinions of military advisers (all in conformity with regard to Article 3 of the said treaty), they were convinced that the allignment they thereby established was equitable.

iv) *Equity in Boundary Arbitration*

It is true, as the Chaco case demonstrates, and as Jenks[86] remarks, that "in boundary cases it may sometimes be particularly difficult to distinguish clearly the application of principles of equity. . . and decisions *ex aequo et bono*." Indeed, the distinction would seem formal in such cases.

In the present context, "the application of equitable principles" usually means no more than instructing the Tribunal, as did Colombia and Ecuador, by the Convention signed between them in Bogota, on June 5, 1907[87], "Leaving to one side strict law, to adopt an equitable line in accordance with the necessities and convenience of the two countries" (Article 10). Such action on the basis of the maxim "Equity regards the balance of convenience" might, however, be refused by the arbitrator.

Thus, the Tribunal in the Caravairola Alp Arbitration, pointing out that

> "it is not clear. . . whether the High Contracting Parties have intended to authorize the arbitrators to determine a frontier line with a view to mere convenience or whether it is expected that they should solve the question strictly according to the principles of right"[88]

considered that it was not authorized to act on this basis but must decide on a strictly legal basis.

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[85] See *A.J.I.L.*, Vol. 33 (1939), p. 180.

[86] *Op. cit.*, p. 357.

[87] See *A.J.I.L.*, Official Documents, 1908, p. 285.

[88] See MARTENS, *op. cit.*, p. 489.

Otherwise, "equity" may be resorted to in relation to territorial partition, in which case delimitation is a subsidiary operation.

Thus, in the above related-to British Guiana – Brazil boundary arbitration[89], the arbitrator found that there was not sufficient evidence to decide the controversy over certain parts of the territory in litigation, and accepted as a rule of necessity that he should make the division required, taking account of "natural" lines and giving preference to the alignment which afforded the most equitable partition of the territory in dispute[90].

v) *Arbitration on a Basis Defined by the Parties*

The submission of delimitation for arbitration may be facilitated by a prior agreement between the parties, determining the basis on which the operation has to be carried out. Such submission has usually had in view the adaptation of the boundary to territorial realities.

The pivot case is the British Guiana – Venezuela Boundary Arbitration[91].

By the terms of the Treaty of Washington, February 2, 1897[92], the parties appointed an Arbitral Tribunal to determine the boundary line between British Guiana and Venezuela (Article 1).

Article 4 provided that:

> "in deciding the matters submitted, the Arbitrators shall ascertain all facts which they deem necessary to a decision of the controversy, and shall be governed by the following Rules, which are agreed upon by the High Contracting Parties as Rules to be taken as applicable to the case, and by such Principles of International Law not inconsistent therewith as the arbitrators shall determine to be applicable to the case.
>
> a) Adverse holding or prescription during a period of 50 years shall make a good title. The arbitrators may deem exclusive political control of a district, as well as actual settlement thereof, sufficient to constitute adverse holding or to make title by prescription.
>
> b) The arbitrators may recognize and give effect to rights and claims resting on any other ground whatever, valid according to international law, and on any principles of international law which the arbitrators may deem to be applicable to the case, and which are not in contradiction of the foregoing rule.

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[89] *Supra*, this Section, A (i).

[90] See MARTENS, *op. cit.*, p. 489.

[91] See LAUTERPACHT, Hersch. *Private Law Sources and Analogies of International Law.* London. Longmans, Green & Co., 1927; pp. 227-233.

[92] MARTENS, *N.R.G.*, 2e. sér., Vol. 28, p. 328.

c) In determining the boundary line, if territory of one party be found by the Tribunal to have been at the date of this treaty in occupation of the subjects or citizens of the other party, such effect shall be given to such occupations as reason, Justice, the principles of international law, and the equities of the case shall in the opinion of the tribunal require".

As Cukwurah[93] rightly remarks, these special stipulations were fundamentally designed with a view to delimitation and not for determination of territorial sovereignty. The ultimate aim of the parties being, however, to adapt the boundary to the factual situation, they could not but refer to notions which, in relation to questions of territorial acquisition, are an expression of the principle *ex facto oritur jus*.

Likewise, in the Convention of Stockholm, March 14, 1908[94], Norway and Sweden, referring delimitation of their maritime boundary to the Panel of the Permanent Court of Arbitration, stipulated (Article 1) that:

"The Court of Arbitration shall have power to determine how far the boundary line should be considered to be, either wholly or in part, determined by the Boundary Treaty of 1661, together with the charts appertaining to the same, and how such boundary line is to be drawn, and also, insofar as the boundary line can be considered as undetermined by the Treaty and chart in question, shall have power to determine the same, having regard to actual conditions and the principles of international law".

In its award[95] the Tribunal laid great emphasis on the maxim *quieta non movere*[96], and delimited the maritime boundary (as far as it was not determined by the Royal Resolution of the 15th March, 1904), accordingly.

Relevant law in the present context being too uncertain to command the confidence of parties in Tribunals, the device of adjudication on a precise, concretely agreed-upon basis seems adequate. It has, therefore, been resorted to in some cases of boundary arbitrations, as by Colombia in disputes with her neighbours, but only with meagre tangible results.

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[93] *Op. cit.*, p. 162.

[94] MARTENS, *N.R.G.*, 3e. sér., Vol. 2. p. 761; *B.F.S.P.*, Vol. 102, p. 731.

[95] See MARTENS, *ibid.*, Vol. 3, p. 85; *A.J.I.L.*, Vol. 4 (1910), p. 226; SCOTT, *Hague Court Reports*, p. 122.

[96] See SCOTT, *ibid.*, p. 130.

Thus, by the Convention of Bogota, November 5, 1904[97], Colombia and Ecuador submitted for arbitration to the Emperor of Germany "the pending question of the boundaries between the two Republics" (Article 1). Article 6 stipulated:

> "Ecuador and Colombia acknowledge that the Principal bases for a determination of their rights in this arbitration are as follows:
>
> a) The Colombian law of June 24, 1824, in regard to territorial division;
> b) The Treaty of Peace of September 22, 1829, between the old Republic of Colombia and Peru; and
> c) The Treaty of July 9, 1856, in so far as it is binding between the Republics of New Granada (now Colombia) and Ecuador, without prejudice to any additional historic-Juridical antecedents which the parties in interest may seem fit to cite and which are not at variance with the above-mentioned bases".

No award, however, was rendered in this occasion. The boundary was, instead, delimited by agreement through negotiations[98].

## B. *FORM OF THE TRIBUNAL*

As to the form, boundary arbitration does not essentially differ from other kinds of arbitration. It can be either individual or plural[99].

In most cases of individual arbitration, the parties have chosen some chief of state as arbitrator, arbitration being generally considered as impersonal, relating to the function of the arbitrator rather than to his person.

As to plural arbitration, apart from the interesting, unusual case of the appointment of six Presidents (no *umpire*) to arbitrate between Bolivia and Paraguay in the Chaco dispute (see Article 2, treaty of Buenos Aires[100]), the case of delimitation by mixed arbitral commissions deserves special notice.

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[97] *U.S. For. Rel.*, 1905, p.241.

[98] Treaty of Bogota, July 15, 1916; *B.F.S.P.*, Vol. 110, pp.826-829. For closely resembling cases see Article 1 of the Treaty of Lima, May 6, 1904, between Colombia and Peru (DESCAMPS-RENAULT. *Receuil*, Vol.4, p.1031); Article 1, Treaty of Bogota, September 12, 1905, between the same parties (*ibid.*, 1905, p.853); Article 5, Convention of Buenos Aires, January 12, 1907, between Bolivia and Paraguay (*ibid.*, 1907, p.850).

[99] See LAPRADELLE, *La Frontière*, pp.128-132.

[100] *Op.cit.*

These mixed commissions have an authoritative decision-making power, which distinguishes them from various other sorts of commissions (be these called "delimitation" commissions or otherwise), the function of which is purely technical and preparatory[101]. As a genuine delimitation operating decision is only that decision which is final and authoritative in itself, the character of *res judicata* is indispensable.

A case in point is the delimitation of Latvia's boundaries with its neighbouring, equally newly-independent states of Estonia and Lithuania, in the aftermath of the First World War.

By the terms of Article 1 of the Convention of Walk, signed between Estonia and Latvia on March 22, 1920[102], both governments agreed "to entrust the final determination of the frontier between their territories" to a joint commission consisting of two members appointed by each government, together with a chairman. By the terms of Article 4 of this Convention the commission was instructed, in arriving at its decision, to take account of "ethnological and historical principles and the states' political interests of each party (military, strategical, economical and communicational) and the interests of local population".

The terms of Articles 1 and 3 of the convention signed between Latvia and Lithuania on September 23, 1920[103] are almost identical[104].

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[101] Of such a character, for example, was the commission charged, at the close of the last century, by France and Great Britain to "fix, by mutual agreement, after examination of the titles produced on either side, the most equitable delimitation between the British and French possessions in the region situated to the West of the Lower Niger" (Declaration of London, January 15, 1896 – MARTENS, *N.R.G.*, 2e. sér., Vol. 23, p.238). Such commissions, in spite of the appearance, did not have an obligatory decision-making power, as they were used to prepare protocols to the attention of the parties, which these latter could subsequently adopt or reject.

Thus, in the above case there followed the Convention of Paris, June 14, 1898 (MARTENS, *N.R.G.*, 2e. sér., Vol. 29, p.116) between France and Great Britain, by which both governments agreed to confirm the Protocol prepared by the commissioners delegated by each of them.

Likewise, when the same parties appointed, by their declarations of London, August 5, 1890 (HERTSLET's *Commercial Treaties. A Collection of Treaties and Conventions between Great Britain and the Foreign Powers 1354-1921.* London, Vol. 18, p.346; *B.F.S.P.*, Vol.82, p.89) a joint commission to determine the line separating spheres of influence in the Gold Coast, Africa, the boundary was actually fixed by the agreement between the parties, upon the propositions of this commission, in July 12, 1893 (HERTSLET, *ibid.*, Vol. 19, p.228; *B.F.S.P.*, Vol. 85, p.315).

[102] *L.N.T.S.*, Vol.2, p.188; MARTENS, *N.R.G.*, 3e. sér., Vol. 14, p.93; *B.F.S.P.*, Vol.113, p.975.

[103] *L.N.T.S.*, Vol. 2, p.234; MARTENS, *N.R.G.*, 3e. sér., Vol. 14, p.96; *B.F.S.P.*, Vol.113, p.1093.

[104] And see *Annual Digest (and Reports) of Public International Law*, 1935–1937, case No. 52.

## C. *ACCEPTABILITY OF DELIMITING AWARDS*[105]

### i) *Compulsory Arbitration*

By the terms of Article 24 of the Treaty of Berlin, July 13, 1878,[106] Germany, Austria-Hungary, France, Great Britain, Italy and Russia indicated their intention to offer Turkey and Greece their mediation in case the states last mentioned "ne parviendraient pas à s'entendre sur la rectification de frontière indiquée dans le Treizième Protocole du Congrès de Berlin".

On June 11, 1880, however, the mediatory powers have decided

> "que leurs représentants près Sa Majesté l'Empereur d'Allemagne se réuniraient en conférence à Berlin le 16 de ce mois, pour déterminer, à la majorité de voix, et avec l'assistance d'officiers possédant des connaissances spéciales, la ligne de frontière qu'il convient d'adopter"[107].

The powers thus instituted a procedure which can be termed "compulsory Arbitration"[108] and which culminated in an award, rendered on July 16, 1880[109]. This explained that the negotiations between Turkey and Greece for rectification of their boundaries having brought no results,

> "les Soussignés, plénipotentiaires des Puissances appelées par les prévisions de l'Acte du 13 juillet 1878 à Berlin, conformément aux instructions de leurs Gouvernements, et après mure délibération, s'inspirant de l'esprit et des termes du Protocole XIII du Congrès de Berlin, ont adopté, à l'unanimité, le tracé suivant. . .".

This "award", involving an actual decision, and not merely mediation, as contemplated by Article 24 of the Treaty of Berlin had, of course, no constitutive value. As an arbitrator acts upon the basis of the compromise exclusively, the competence of an arbitral Tribunal is confined to matters concerning the parties signatory of it; this results from the fundamental voluntary nature of arbitration.

Indeed, the "award" in question was accepted by Greece, but rejected by Turkey, and a convention was thereafter signed between the mediatory

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[105] The more general question of effectiveness of adjudication (see CUCKWURAH, pp.200-233), relating to the executionary phase of the operation of boundary making, does not arise in the present context. The only way delimitation becomes effective being through on the ground demarcation, this question falls outside the scope of the present study.

[106] MARTENS, *N.R.G.*, 2e. sér., Vol. 3, p.449; *B.F.S.P.*, Vol.69, p.749.

[107] See *B.F.S.P.*, Vol.72, p.469.

[108] See DARBY, E.W., *International Tribunals.* London. 1904; p.802.

[109] See MARTENS, *N.R.G.*, 2e. sér., Vol. 6, p.114.

powers and Turkey at Constantinople on May 24, 1881[110], in which the parties recited their resolution to conclude a convention designated to give the question of rectification of the boundary a definitive solution and thereby described the said boundaries (Article 1). Article 18 provided that this convention "sera immédiatement suivie de la stipulation d'une convention entre Sa Majesté l'Empereur des Ottomans et Sa Majesté le Roi des Hellens, contenant les mêmes dispositions". In execution of this stipulation a Treaty was signed between Turkey and Greece, at Constantinople, on July 21, 1881[111]. Accordingly, this delimited the boundary[112].

ii) *Conformity with the Special Agreement*

The exceptional case of compulsory "arbitration" apart, the concrete, precise, and direct nature of the arbitrator's task, as determined in the *compromis*, naturally conditions the validity of awards. In boundary cases, as well as in other cases of arbitration, this may give rise to contestations as to the acceptability of the award.

As the choice of the arbitrator(s) is, practically, the crucial issue in arbitration proceedings, nullity of the award may be invoked on the ground that the arbitrator was not designated according to the stipulations of the *compromis*.

Thus, in the case concerning the Arbitral Award made by the King of Spain on 23 December 1906[113], Nicaragua contended that the decision given by the King of Spain on that date[114] did not possess the character of an arbitral award. It impugned, therefore, the validity and the compulsory force of this award, *inter alia* on the grounds that the King of Spain was not invested with the powers of an arbitrator.

This contention rested on two grounds[115].

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[110] See MARTENS, *N.R.G.*, 2é. sér., Vol. 6, p.753; *B.F.S.P.*, Vol.72, p.382.

[111] MARTENS, *ibid.*, Vol.8, p.2; *B.F.S.P.*, *ibid.*, p.1186.

[112] For a similar affair of pseudo-arbitration between Austria and Czechoslovakia and between Hungary and Rumania, carried out by Hitler and Mussolini on November 2, 1938 and August 30, 1940, respectively, as followed by declarations of acceptance imposed upon the victim states see MARTENS, *N.R.G.*, 3e. sér., Vol. 36 (1939), pp.662-664; *ibid.*, Vol. 38, p.338; *ibid.*, Vol. 39, p.348. This was duly annuled in the peace treaties of 1947.

[113] Judgement of 18 November 1960. *I.C.J. Reports*, 1960, p.192.

[114] See MARTENS, *N.R.G.*, 2e.sér., Vol. 35, p.563; *B;F.S.P.*, Vol.100, p.1096.

[115] See *I.C.J. Reports*, 1960, p.205.

The first of these was that the Tribunal was improperly constituted, since the national arbitrators had failed, before appointing the King of Spain, to comply with all the requirements of Articles III and V of the Gamez-Bonilla Treaty[116], such as asking one by one the members of the foreign Diplomatic Corps accredited to Guatemala, and then attempting to come to an agreement on any other foreign or Central American public figure for the purpose of constituting a three man arbitral Tribunal[117].

Indeed, it appears that the arbitrators appointed by the respective parties contented themselves with shorter proceedings for organizing the arbitration[118]. But the Court, dismissing the Nicaraguan argument that its acquiescence in the decision to designate the King of Spain as sole arbitrator did not detract from the essential invalidity of that decision under the *compromis,* adopted a somewhat ambiguous attitude; having decided that Nicaragua recognized or acquiesced to the validity of the award and, therefore, could no longer refute it[119], it discarded Nicaragua's contentions one by one.

Thus, the Court summarily dismissed the argument that the Tribunal was not properly constituted on the ground that subsequent interpretation and application of the treaty by the parties counts more than strict compliance with the provisions of the *compromis.* Indeed,

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[116] For the text of the treaty, as translated from the Spanish by the Registry of the Court, see *ibid.*, pp.199-202.

[117] Articles 3-7 of the Gamez-Bonilla Treaty, signed at Tegucigalpa on October 7, 1894, provided for a system of arbitration in case the Mixed Boundary Commission (Article 1) proved unable to settle the boundary question. Disputed point or points of the boundary line were to be referred, in the first place, and not later than one month after the final session of the Mixed Boundary Commission,

> "to the decision, without appeal, of an arbitral tribunal which shall be composed of one representative of Honduras and another for Nicaragua, and of one Member of the foreign Diplomatic Corps accredited to Guatemala, the later to be elected by the first two, or chosen by lot from two lists containing three names each, and proposed one by each party". (Article 3).

Article 5 provided that:

> "in case the foreign Diplomatic Representative should decline the appointment, another election shall take place within the following ten days, and so on. When the membership of the foreign Diplomatic Corps is exhausted, any other foreign or central American public figure may be elected, by agreement of the commissions of Honduras and Nicaragua, and should this agreement not be possible, the point or points in controversy shall be submitted to the decision of the Government of Spain and, failing this, to that of any such American Government upon which the Foreign Offices of both countries may agree".

the Court expressed the opinion that:

> "it was within the power of the arbitrators to interpret and apply the articles in question in order to discharge their function of organizing the arbitral tribunal. Whether they had in fact exhausted the membership of the Diplomatic Corps accredited to Guatemala and failed to reach agreement on the election of any other foreign or Central American public figure or whether they had considered such steps as optional and unlikely to lead to a fruitful result, the fact remains that after agreeing that the relevant articles of the Treaty had been complied with they agreed to proceed to the designation of the King of Spain as arbitrator".

Accordingly, the Court concluded that:

> "The requirements of the relevant articles of the Gamez-Bonilla Treaty by the two national arbitrators had already been complied with when, at the meeting of 2 October 1904, it was agreed by common consent that the King of Spain be designated as arbitrator and that he should be requested on behalf of both Governments to undertake the task"[120].

Likewise, the Court dismissed the second reason put forward by Nicaragua for challenging the validity of the Tribunal; namely, that the Gomez-Bonilla Treaty had lapsed before the King of Spain agreed to act as arbitrator[121] upon its construction of the intention of the parties, as evidenced by the treaty as a whole. It also invoked the subsequent practice of the parties as evidence of their original intention on the matter.

* * *

The disinclination of the Court, in its concentration on the conduct of the parties themselves, to examine general issues, the Court summarily refuting all of Nicaragua's contentions, was especially evident when it came to deal with Nicaragua's other complaints, namely, that the award was vitiated by

a) excess of jurisdiction;
b) essential error;
c) lack or inadequacy of reasons in support of the conclusions arrived at by the Arbitrator[122].

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[118] See *op.cit.*, p.205.
[119] See *op.cit.*, pp.207, 209, 213.
[120] *Op.cit.*, p.206.
[121] See *op.cit.*, pp.205, 207-209.
[122] *Op.cit.*, pp.210-217.

In fact, the Court indicated that, since Nicaragua had already recognized the validity of the award, it was not strictly necessary to examine these allegations. Examining briefly these contentions, it found them all without foundation.

Particularly interesting is the Court's rejection of Nicaragua's first contention, that the King of Spain exceeded his Jurisdiction by reason of non-observance of the rules laid down in the *compromis* (Article 2). Indeed, such contentions have also been used to impugne the validity of other boundary awards.

The Treaty of 1894 provided (Article 2), as rules to be conformed with by the Mixed Boundary Commission, that (paragraph 3), "each Republic is owner of the territory which at the date of independence constituted respectively the provinces of Honduras and Nicaragua" and that "fully proven ownership of territory" should be considered in determining the boundary, while recognition of "Juridical value to *de facto* possession alleged by one party or the other" was to be precluded (paragraph 4). Paragraph 6 authorized the commission to grant compensations and even fix indemnities in order to establish a "well defined, natural boundary line".

The arbitrator having proceeded to grant compensations as provided for by Article 2, paragraph 6, of the treaty in order to determine the boundary line, Nicaragua contended that the discretionary power endowed by paragraph 6 was vested in the Mixed Boundary Commission and could not be exercised by the arbitrator who, therefore, in exercising this function exceeded his powers or went beyond their legitimate limit[123]. The Court confined itself to an answer that Article II as a whole was intended not only for the guidance of the Mixed Commission but also to furnish guidance for the arbitrator. The latter, therefore, did not exceed his powers by applying paragraph 6, neither did he go beyond its legitimate scope.

*Ad hoc* Judge Urutia Holguin, in his dissenting opinion, strongly criticised this conception of the Court.

According to him, the countries of Latin America, whose Constitutions fixed their boundaries on the basis of the *uti possidetis juris* existing at the time of their advent to independence "envisaged only strictly legal decisions when they undertook to submit the delimitation

[123] *Op.cit.*, p.215.

of their boundaries to arbitration"[124]. This rule, laid down by the parties for recourse to arbitration, is not merely academic but a condition *sine qua non*, having its origin in the actual constitutions of all these states; addressing themselves to the King of Spain, Colombia, Costa Rica, Venezuela, Nicaragua, Honduras, Peru and Ecuador, the countries which asked him to interpret the *uti possidetis juris* in accordance with the titles of Spanish sovereignty did so because they:

> "thought that he was the best qualified authority to interpret his own legal rules, but they certainly did not think of entrusting to 'his equity' the interpretation of constitutional clauses which had in fact been approved for the very purpose of throwing off the Spanish yoke"[125].

After examination of other, analogous cases, the dissenting Judge arrived at the conclusion that the King of Spain exceeded his powers by the "improper application of paragraph 6 of Article II of the Gamez-Bonilla Treaty"[126].

The interesting point in the present case is the evident disinclination of the Court to weaken the principle of *res judicata* by a thorough examination of the contentions of Nicaragua relating directly to the question of validity of the award and by a profound concentration, instead, on a perusal of the conduct of the states concerned.

Indeed, this factor, as we have seen in Chapter One above, is of capital importance in the context of delimitation and whereas, as Judge Hologuin himself pointed out[127], there is no compulsory international jurisdiction by means of which the causes of nullity may be put right, and that "The absence in international law of such a body cannot confer an automatic character upon nullity", the continued uncertainty in the matter naturally tends to emphasize the "conduct" factor to the expense of an examination of the intrinsic regularity of awards.

International organs probably will, in future cases, adopt the attitude of Sir Percy Spender[128] who based his separate opinion exclusively on this ground. To the manifest dissatisfaction of the

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[124] *Op.cit.*, p.226.
[125] *Op.cit.*, p.227.
[126] *Op.cit.*, p.233.
[127] See *op.cit.*, p.221.
[128] See *op.cit.*, p.219-220.

representatives of the Spanish-American legal system who, in the King of Spain case, considered that this factor, in case one of the parties contends for the nullity of the award, is of no more than subsidiary importance[129]. Indeed, in other recorded cases, all related to boundary disputes in Latin America, in which the validity of awards was contested[130], the question of state conduct did not arise and in this respect the judgement of the International Court of Justice of November 18, 1960 constitutes a noteworthy innovation.

It was already mentioned[131] that the arbitrator in the Costa Rica – Panama boundary dispute was requested to delimit the boundary within a prescribed zone and that the validity of the award of French President Loubet was contested by Costa Rica in this connection[132]. Indeed, the government of Costa-Rica protested, since 1907, that the arbitrator exceeded his powers in alienating a territory which it had always held in undisputed possession[133]. As we saw above[134], Chief Justice White of the United States found, in his award on the matter, that part of the Loubet alignment had to be treated as non-existing.

The reasons put forward for this decision are interesting, for the arbitrator did not satisfy himself with the adoption of Costa-Rica's arguments on the matter, but further interpreted the powers of his predecessor restrictively by virtue of a construction of the *compromis* not very coherent with the apparent meaning of its terms.

Indeed, the arbitrator found that by the Treaty of Paris, of January 20, 1886[135], the parties did not endow his predecessor with the authority of freely delimiting a boundary within the disputed territory (as seems to be the evident meaning of Articles 2 and 3 of the arbitration compromise). But that the dispute was only as to which of two rivers, respectively claimed by the parties, was the bounding one[136].

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[129] See separate declaration of Judge Moreno Quintana, *op.cit.*, pp.29/30.

[130] See *op.cit.*, p.225.

[131] *Supra*, this Section, A (i).

[132] *Supra*, this Chapter, note 9.

[133] See *U.S.For. Rel.*, 1910, p.772; *A.J.I.L.*, Vol. 15 (1921), pp.236-7.

[134] *Supra*, this Chapter, Section 1.

[135] *Op.cit.*

[136] See *A.J.I.L.*, Vol. 8 (1914), p.913, at p.915.

He therefore stated that the former arbitrator, in establishing a mountain feature as the boundary, exceeded his powers[137] because:

> "by the facts of the case. . . a dispute only as to which of two rivers was the bounding one with no difference whatever as to what either of the parties would be entitled to if either river relied upon was made the boundary, no river boundary was made, but a mountain range was fixed carrying with it a large amount of territory to which the successful party would not possibly have had any title if every claim was made in the dispute as to that boundary had been held to be correct"[138]

The arbitrator, in his eagerness to establish the nullity of the mountain alignment described in the Loubet award, did not consider some facts relating to the conduct of the parties subsequent to the issuance of this award[139], such as could be invoked in order to sustain the validity of the Loubet alignment, irrespective of the question of the intrinsic regularity of the award which described it. Indeed, the arbitrator, insisting, in relation to his predecessor's award, that

> "Discretion or compromise or adjustment, however cogent, might be the reasons which would lead the mind beyond the domain of rightful power, and however much they might control if excess of authority could be indulged in, can find no place in the discharge of the duty to arbitrate in a matter in dispute according to the submission and to go on further"[140]

did not follow this statement himself. Purporting to delimit the boundary he apparently acted *ultra vires*[141] and, indeed, Panama thereafter argued that, as Costa Rica did not accept the Loubet award, so Panama rejected the White award, and that the matter must revert to the line of *status-quo*[142].

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[137] *Ibid.*, p. 936.

[138] *Ibid.*, p. 926.

[139] See IRELAND, *Boundaries, Possessions and Conflicts in Central and North America and the Carribean.* pp. 33-35.

[140] *A.J.I.L., op. cit.*, p. 939.

[141] See *Supra*, this Chapter, Section 1.

[142] See *A.J.I.L.*, Vol. 15 (1921), p. 236.

As demonstrated in the foregoing case an arbitrator who has to decide between two alternative lines, in case he decides upon a third line, thus disregarding the arbitral agreement, does not render an award of juridical significance. The arbitrator is empowered, in such cases, to decide in favour of one of the two parties and not to act as "*amiable compositeur*"[143]

Thus, in the arbitration between Great Britain and the United States on the north-eastern boundary question[144], the arbitrator, King William I of the Netherlands, held that:

> "Considérant que, d'après ce qui précède, les arguments allégués de part et d'autre, et les pièces exhibées à l'appui, ne peuvent être estimés assez prépondérants pour déterminer la préférance en faveur d'une des deux lignes, respectivement réclamées. . . et que la nature du différend, et les stipulations vagues, et non suffisament déterminées du traité de 1783 n'admettent pas d'adjuger l'une ou l'autre de ces lignes à l'une des dites parties, sans blesser les principes du droit, et de l'équité envers l'autre; considérant que la question se réduit, comme il a été exprimé ci-dessus, à un choix á faire du terrain . . . et que, dès lors, les circonstances, dont dépend cette décision, ne sauraient être éclaircies d'avantage, au moyen de nouvelles recherches topographiques, ni par la production de pièces nouvelles".

Accordingly, the arbitrator proceeded to delimit a compromise alignment as the boundary.

The United States refused to accept this award, protesting that the arbitrator, abandoning altogether the boundaries described in the arbitral agreement and substituting for them a different boundary line, had exceeded his powers, since:

> "If, on investigation, that arbiter found the language of the Treaty, in his opinion, inapplicable to, and wholly inconsistent with, the topography of the country, so that the Treaty of 1783, in regard to its description of the Boundary, could not be executed according to its own express stipulations, no authority whatever was conferred upon him to determine or consider what practicable Boundary Line should, in such case, be substituted and established. Such a question, as is here supposed, the United States would, in is believed, submit to the definitive decision of no Sovereign"[145]

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[143] "The duty which your Majesty has been pleased to undertake is one of pronouncing an award which shall do substantial justice between the parties without attaching too great an importance to the technical points which may be raised on either side. This is what we consider to be the function of an 'amiable compositeur'."

See Chile – U.S.A. arbitration, July 5, 1911. *A.J.I.L.*, Vol. 5 (1911), p. 1081.

[144] See the award of January 10, 1831 in MOORE, *International Arbitrations*, Vol. I, p. 119.

[145] See *B.F.S.P.*, Vol. 22, p. 772, at p. 773.

iii) *Use of Improper Methods by the Tribunal*

The Netherlands award was criticized mainly because of its compromise character. It is true, as one of the agents of the United States in this case commented, that "An arbitrator, whether he be King or farmer, rarely decides on strict principles of law. He has always a bias to try, if possible, to split the difference"[146]. This is a misgiving usually expressed about arbitral proceeding in general[147].

But with regard to the special situation of international law in the present context, whether or not an award can be attacked as being a diplomatic compromise and not a truly judicial decision[148] depends on the terms of the special arbitral agreem ent. No imperative rules of general international law applicable, the functions of the arbitrator, in case no conventional rules are established by the parties to his attention, resemble greatly those of a diplomat. This may result in the arbitrator using diplomatic, instead of judicial, methods, in such a way that the whole award may be put in question.

In relation to the British Guiana – Venezuela Boundary Arbitration[149], a posthumous publication of a memorandum on the settlement of the boundary dispute[150] propped Venezuela's case for reopening the whole boundary question.

This memorandum-prepared by Mr. Servo Mallet-Prevost, a distinguished international lawyer who served as agent and counsel of Venezuela before the Paris Arbitration Tribunal in the case under review-consists mainly of a statement of facts within Mr. Mallet-Prevost's personal knowledge about certain incidents relating to the way in which the decision of the arbitrators in this case was brought about by the President of the Tribunal.

In fact, it results from the memorandum that M. de Martens, the President of the Arbitral Tribunal, had informed the American Arbitrators, after the conclusion of the arguments in the said arbitration and while the Tribunal was considering its judgment, that the British Arbitrators[151] were

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[146] See *Columbia Law Review*. Vol. II, June 1911, p. 493, at p. 495.

[147] CUKWURAH, p. 202.

[148] See DENNIS, William C. "Comprom ise – The Great Defect of Arbitration". *Columbia Law Review*, Vol. II (1911), p. 493.

[149] *Op. cit.*

[150] See SCHOENRICH, Otto. "The Venezuela – British Guiana Boundary Dispute". *A.J.I.L.* Vol. 43 (1949), p. 523.

[151] Under the arbitration treaty between Great Britain and Venezuela (*op. cit.*), five Judges

ready to decide for the so-called Schombrugk line (substantially the British claim), and that if the American arbitrators insisted on an alignment which corresponded, substantially, with the Venezuelan contention he would join with the British arbitrators and make the British line the boundary by majority vote of the Tribunal[152]. But that if the American Judges agreed to the compromise line he proposed (which lay between the two claimed lines) he would secure the agreement of the British arbitrators to vote for it and the award of the Tribunal would be unanimous. In these circumstances (it seems possible, as W.C. Dennis pointed out[153] that de Martens threatened the British Judges that he would decide with the Americans unless they agreed to his compromise alignment, in the same way that he threatened the Americans that he would side with the British unless they made the compromise line unanimous) the compromise alignment, lying east of the Orinoco river, was unanimously adopted by the Tribunal.

The Mallet-Prevost memorandum gave rise to ardent polemics as to its substance[154] and the question was raised before the United Nations General Assembly in 1962[155]. No debate, however, took place in the Special Political Committee of the Assembly on the question, the committee taking account of the possibility of direct discussions between the parties concerned[156]. These discussions took place thereafter[157] and were followed by an agreement signed between the parties on February 17, 1966, on the procedure for settlement of the dispute[158].

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were appointed: Lord Chief Justice Russel and Lord Justice Collins of Great Britain, Chief Justice Fuller and Justice Brewer of the United States Supreme Court, and as President, Professor F. de Martens.

[152] Article 5 of the arbitration Treaty of February 2, 1897 (*op. cit*) provided that "All questions considered by the Tribunal including the final decision shall be determined by a majority of all arbitrators".

[153] See *A.J.I.L.*, Vol. 44, p. 720, at p. 726.

[154] See CHILD, Clifton J. "The Venezuela British Guiana Boundary Arbitration of 1889". *A.J.I.L.*, Vol. 44 (1950), p. 682.

[155] See LAUTERPACHT, Elihu. *The Contemporary practice of the U.K. in the field of International Law*. London. The British Institute of International and Comparative Law. 1962; Vol. II, July 1 – December 31, 1962, p. 161 ff.

[156] *Ibid.*, p. 175.

[157] *The Times*. London. November 4, 1963, p. 8, *ibid.*, November 7, 1963, p. 9.

[158] See *Keesing's Contemporary Archives*. Vol. 15 (1965-1966), p. 21324. b.

In the Buraimi arbitration, reference to which was made in Chapter Two above, alleged irregular conduct by an arbitrator frustrated the arbitral proceedings.

In fact, on September 16, 1955, proceedings were suspended, the British member of the Tribunal withdrawing on the ground that the Saudi Arabian member was conducting the case of Saudi Arabia before the Tribunal by maintaining relations with persons on the Saudi side of the case, instructing the Saudi agent and committing other irregularities which disqualified him as an arbitrator[159]. A week later the President of the Tribunal resigned, shortly to be followed by one of the neutral members of the Tribunal[160].

On October 26, 1955, Sir Anthony Eden stated in the British House of Commons that one of the two remaining neutral arbitrators had resigned and that as the Saudi Arabian authorities had "systematically disregarded" the agreed conditions of arbitration, a fair and impartial arbitration was not possible[161]. Consequently, no award was rendered on the question and the boundary in the territory in dispute was not delimited[162].

It should be noted that the reasons for the failure of this attempt at delimitation by arbitration seem to be more political than juridical[163]. The parties could have overcome the difficulties – the special arbitration agreement provided them with the means to proceed, at least before the resignation of the neutral judges[164].

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[159] *United Kingdom Foreign Office Press statement* of October 4, 1955.

[160] *The Times*. London. September 17, 1955, p. 6 and September 24, 1955, p. 5.

[161] *Parliamentary debates, House of Commons, 1955-56*. October 25 to November 11, pp. 198-201

[162] *Keesing's Contemporary Archives*. Vol. 10 1955-56, p. 14534.

[163] See CORBETT, Percy E. *Law in Diplomacy*. Princeton. New Jersey. Princeton University Press, 1959, pp. 179-182.

[164] And see GOY, Raymond. "L'affaire de l'oasis de Buraimi". *A.F.D.I.*, 1957, pp. 188-205.

## D. *THE RECENT TREND IN DELIMITATION ARBITRATION*

In manifest contradiction to the pre World War practice, delimitation by arbitration has become, after World War II, a singularly rare phenomenon. As the Buraimi case demonstrates, governments seem to be reluctant to entrust the matter to arbitrators.

The sole registered case of delimitation by arbitration, the Rann of Kutch arbitration[165], related to a remote, relatively unimportant, and very special area, both geographically (the Rann being an area sometimes dry and desert-like, at other times marshy and nearly maritime) and juridically, since in the Rann zone could be recognized the current rare phenomenon of a frontier area, having width as well as length. As Pakistan submitted[166], "the whole width of the Rann (without being a condominium) formed a broad belt of boundary between territories on opposite sides" and as the Chairman of the Tribunal concluded[167]:

> "the boundaries in the Rann had not been determined even though there must have existed some limits in space to the sovereign rights of the neighbouring countries. My notion as to the true state of such limits. . . is akin to Pakistan's conception of the Rann as forming a broad belt of territory".

The task of the Tribunal in this case was very original, since it was neither to apportion territory, nor to fix the boundary line in an already apportioned area, but to reduce this wide frontier zone to a widthless line[168].

In these circumstances, the chairman – having found that "there did not exist at any time relevant in these proceedings a historically recognized and well-established boundary in the disputed region"[169], and having noted that the absence of such a boundary did not, in the contexts of the case, imply that the disputed territory was *terra nulius*[170] – proceeded to delimit the boundary, according special significance to display of state authority other than permanent occupation and possession and to attitudes expressed or implied by one or several of the sovereign entities abutting upon the Rann in actual extension of their respective dominion[171].

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[165] See *The Indo-Pakistan Western Boundary Case Tribunal.* Award, 19 February (Introduction, Conclusions and three maps), Printed by the Manager, Government of India Press, Faridabad, 1968; see also excerpts in *International Legal Materials* Vol. 7 (1968), p. 633.

[166] *International Legal Materials, ibid.*, p. 647.

[167] *Ibid.*, pp. 668, 669.

[168] See submission of Pakistan, *ibid.*, p. 647.

[169] *Ibid.*, p. 669.

[170] *Ibid.*, p. 679.

[171] *Loc. cit.*

The chairman carefully appreciated and balanced the arguments invoked by the parties and, especially, the fact that the action of the British Government in India, as from the beginning of the 20th century and until the eve of independence, gradually assumed a more precise form, as attested by the depiction on maps of a boundary between Sind and Kutch, or between Sind and the states of Western India, along the northern edge of the Great Rann (this alignment was roughly in accordance with the Indian claim, and these maps were found by the chairman to be the most convincing ground of India's case[172] although none of them was a conclusive and authoritative source of title to territory)[173]. Consequently, he ruled in favour of India in all the sectors where he found no specific demonstration of an effective exercise of authority on the part of Sind[174], and decided in favour of Pakistan in a marginal area, wholly surrounded by Pakistan territory[175].

While the chairman's decision was entirely concurred with by the arbitrator nominated by Pakistan, the arbitrator nominated by India issued a dissenting opinion in which he expressed the view that the function of the Tribunal was to declare the site of the boundary. The Tribunal was not competent, therefore, to "reduce the broad belt of boundary to a widthless line, as urged by Pakistan, because – but for terminology – it would be inventing a boundary which did not exist"[176]. This arbitrator thus adopted the conception of India as to the declarative function of the Tribunal[177].

Although, as De Visscher pointed out[178] the award has "le mérite d'éviter le recours à des critères généraux que les données nettement individualisées du litige ne comportaient pas" some conclusions of general implication may be drawn from this case.

In particular, is should be noted that although both parties in this case did not bind the Tribunal to adhere to either claim line[179] and that the Tribunal was thus endowed with a considerable discretionary power, the Tribunal

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[172] *Ibid.*, p. 683.

[173] *Ibid.*, pp. 684-685.

[174] *Ibid.*, pp. 691-693.

[175] *Ibid.*, p. 692.

[176] *Ibid.*, p. 695.

[177] *Ibid.*, p. 659.

[178] De VISSCHER, Charles. *Problèmes de confins en droit international public.* Paris. A. Pedone. 1969. p. 34.

[179] *Op. cit.*, p. 648.

refused to adjudicate *ex aequo et bono*[180]. Indeed, it seems that future awards will be rendered, rather, on the basis of a balanced appreciation of the "equities" of cases; for the Tribunal seems, in the case under review, to have adopted Pakistan's conception that the alignment must be tested by principles of equity[181].

In yet another aspect, this case confirms the tendency we remarked in relation to adjudication by the International Court of Justice, especially in the Sovereignty over Certain Frontier Lands case and in the Temple case[182], to attach special importance to cartographic documents in the evaluation of evidence produced by the parties.

## 4. SUMMARY

The foregoing pages expound the difficulties encountered by judicial organs, engendered by the essentially non-justiciable nature of delimitation.

As is shown herein, these difficulties have been overcome by adoption of the procedure of *ad hoc* arbitration. This can always be made possible by the parties, as they are free to agree upon the rules to be applied by the Tribunal.

In cases where no such rules were thus agreed upon, the tendency of Tribunals had been to adopt boundary lines to territorial realities, whether being asked to do so by the parties or acting on their own initiative. Rules governing questions of territorial status were thus resorted to, especially in cases of delimitation as a subsidiary operation.

In other cases, Tribunals were endowed by the parties with either large discretionary powers or with an authorization to act *ex aequo et bono.*

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[180] *Ibid.*, pp. 642/3.
[181] *Ibid.*, p. 660.
[182] See *supra*, Chapter One, Section 2, B (iii).

It is, indeed, difficult to draw general conclusions from a single case. The Rann of Kutch case may, however, mark a trend towards decision of alignments upon a balanced examination of "equities"; this actually connotes action according to "the balance of convenience", coupled with a tendency to consecrate the existing *status quo*. Indeed, throughout the foregoing perusal, the tendency of Courts and Tribunals to strengthen the maxim *quieta non movere* is evident, although this is rather manifest on the occasion of delimitation proper than upon consideration of the validity of delimiting awards and in similar adjudications of a declarative nature[183].

In yet another aspect, the discussion of the latter issue illustrates the inherent shortcomings of this device and demonstrates that resort to arbitration is only a second-best solution.

[183] One or two cases of arbitration and judicial decision involving the marginal revision of an already established boundary can be regarded as an exception in this context. This was the case over the Honduras-Nicaragua boundary, where Nicaragua actually had to withdraw from areas she previously administered; and over the Preah Vihear temple, where Thailand had to do the same.

## CHAPTER FOUR

## NORMATIVE REGULATION

### *GENERAL OBSERVATIONS*

As was mentioned several times above, General International Law does not contain any imperative rules governing the establishment of international land boundaries beyond the scope of conventional delimitation (as Section 3 of this Chapter demonstrates matters are, finally, similar in relation to maritime boundaries). Within the scope of the last-mentioned operation no imperative legal rules encumber the freedom of the parties in their search for a mutually convenient alignment and in this sense delimitation is a totaly subjective operation. This flows from the facultative nature of the operation (as Section 2 of this Chapter demonstrates, matters are different in Latin-American International Law, where the *uti possidetis* rule operates as an exception).

Once the process of boundary-making is consummated, however, an objective, independent juridical situation is created[1]. As the boundary becomes a material, on-the-ground reality, its basically rigid nature, juridically expressed by the 'stability and finality' principle, becomes predominant; hence, this legal situation, resulting from the execution of the boundary treaty[2], remains effective, independently of the conventional agreement which initially established it[3].

The situation, therefore, is twofold: whereas the facultative nature of the delimitation operation explains the exclusively conventional procedure for fixation of the boundary, the rigid nature of the situation created engenders itself a normative regulation, independent of the conventional process.

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[1] See CUKWURAH, p. 108.

[2] See First Report on Succession of States and Governments in respect of Treaties by Sir Humphrey WALDOCK, Special Rapporteur of the International Law Commission in its 20th. Session. U.N. Doc. *A/CN. 4/202* (1968), p. 18.

[3] See Second Report on Succession in Respect of Treaties by WALDOCK, Special Rapporteur of the I.L.C. in its 21st. Session. U.N. Doc. *A/CN. 4/214* (1969), pp. 7-10.

No wonder therefore, that in the efforts to promote the codification and development of international law were considered only such rules relating to land boundaries as regulate the situation after delimitation has validly been operated, and that such rules as were thus established are all an expression of the principle of 'stability and finality' of the international boundary.

Thus, Article 62, paragraph 2(a) of the Vienna Convention on the Law of Treaties of May 23, 1969 excepts from the operation of the doctrine *rebus sic stantibus* treaties establishing a boundary. As the I.L.C. concluded, while drafting this rule[4], such treaties should be recognized as an exception to the rule[5] "because otherwise the rule, instead of being an instrument of peaceful change, might become a source of dangerous friction"[6]. There seem to be no qualifications to this exception[7].

Likewise, and through the application, *mutatis mutandis*, of the same general considerations[8], a general reservation was made in regard to the effect of the project articles on succession in respect of treaties, as presented by the Special Rapporteur of the I.L.C.[9], on boundaries established by treaty.

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[4] See *Yb. Int. Law Comm.* 1966, vol. II, p. 117 at p. 259.

[5] Article 59 in the 1966 text; Article 44 in the 1963 text.

[6] *Yb. Int. Law Comm., loc. cit.*

[7] In the discussion of Article 44 in the 1963 draft (*op. cit.*, pp. 39-44) the Canadian government suggested that in order to take account of the possibility that an extraordinary flood, an earthquake of a landslide might conceivably alter the location of a thalweg, watershed or other feature used in a treaty the provision excepting treaties fixing a boundary from the application of the Article should itself be qualified by a clause excluding such cases from the exception. The Special Rapporteur doubted "whether such a case could be said to raise a question of the termination of the treaty on the ground of fundamental change of circumstances" and pointed out that "It would seem rather to raise a problem as to the correct interpretation and application of the Treaty in the light of the changed geographical facts".

For the legislative history of Article 62 see ROSENNE, Shabtai. *The Law of Treaties, Guide to Legislative History of the Vienna Convention*, Leyden. A. W. Sijthoff, 1970; pp. 326/7.

[8] See First Report, *op. cit.*, pp. 16/17.

[9] See First, Second and Third Reports on this topic to the I.L.C. by Sir Humphrey WALDOCK, Special Rapporteur.

Respectively *A/CN. 4/202; A/CN. 4/214 and A/CN. 4/224.*

The latter topic is important in the context of the present study since, as is demonstrated below, the objective situation created through the boundary-making process unexceptionally devolves upon newly-established states in the absence of new conventional agreements. Thus, the problem of international boundaries may be regulated for succeeding states *a priori*, by virtue of a conventional, pre-independence, arrangement.

## SECTION I: STATE SUCCESSION

### A. *THE RULE*

As Sir Humphrey Waldock, Special Rapproteur, pointed out in his First Report on Succession of States and Governments in respect of Treaties[10], the weight of both opinion and practice seems clearly in favour of the view that boundaries established by treaty remain untouched by the mere fact of succession. The project of report elaborated by the Special Rapporteur refers, accordingly, at least four times to the question of boundary treaties[11], which are presented as an exception to the rule stated in Article 6, the general rule regarding a new state's obligations in respect of its predecessor's treaties[12].

At the 22nd Session of the I.L.C., the nineteen members of the Commission which took part in the discussion on the Second and Third Reports on Succession in respect of Treaties[13] were unanimous in endorsing the Special Rapporteur's general approach to the topic and in considering that the draft provided a good working basis for its study by the Commission. Albeit the opposition expressed by one member to the idea that boundary treaties should be considered as included in the categories of treaties constituting possible exceptions to the rule laid down in Article 6 the Commission, in general, placed strong emphasis on the whole question of the so-called "dispositive" or "territorial" or "localized" treaties (which also in-

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[10] *Op. cit.*

[11] See Section B, Chapter C of the Project of Report (*A/CN. 4/L.158/Add. I*).

[12] Article 6 reads: "Subject to the provisions of the present articles, a new state is not bound by any treaty by reason of the fact that the treaty was concluded by its predecessor and was in force in respect to its territory at the date of the succession. Nor is it under any obligation to become a party to such treaty."

Third report on Succession in respect of Treaties. U.N. Doc. *A/CN.4/224*, p. 14.

[13] *Op. cit.*

volve the question of boundaries). Most members indicated that their acceptance of the principle laid down in Article 6 was subject to the reservation of questions relating to such treaties.[14].

i. *The Doctrine*

The doctrine is unanimous in considering that boundaries, once duly established, remain untouched by the mere fact of succession. The reasons put forward by authors are diverse.

Thus, Guggenheim[15] and Ross[16] both point out that boundary treaties "gardent leur validité malgré la substitution d'une competence étatique à une autre"[17]. These writers thus conceive of the boundary treaty as a whole as devolving upon succeeding states.

According to O'Connell "since a state can acquire from another only so much territory as that other possessed, the latter's treaties with neighbouring states delimit the extent of the territory absorbed"[18].

Likewise, Pereira[19] points out that "La raison essentielle du maintien des traités des frontieres est précisement celle qui exclut ces traités du régime général des actes conventionnels. . . c'est qu'en effet la stabilité des frontières est une condition nécessaire à la vie de la communauté internationale et une consequence dirècte du principe du respect de l'intégrité territoriale des Etats, principe consacré par la Charte des Nations Unies". Both these authors thus explain the rule on territorial considerations; rather than looking at the boundary itself, they regard the territory it delimits. The same conception seems to be shared by McNair[20].

Another view, regarding the situation created by the boundary-making process in itself, as a distinct phenomenon, and shared by Castrén[21] Lester[22] and Cukwurah[23] established that:

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[14] See *U.N. Doc. A/CN. 4/L. 158/Add.1* and *Yb. Int. Law Comm.*, 1970, vol. I, p. 262.

[15] GUGGENHEIM, Paul. *Traité de droit international public.* vol. I, p. 465.

[16] ROSS, Alf. *A textbook of International Law.* London, Longmans, Green & Co. 1947, p. 127.

[17] GUGGENHEIM, *loc. cit.*

[18] O'CONNELL, D.P. *State Succession in Municipal Law and International Law.* Cambridge. Cambridge university press, 1967, vol. II, p. 273.

[19] PEREIRA, André G. *La succession d'Etats en matière de traité.* Paris, A. Pedone, 1969, p. III.

[20] McNAIR, Arnold D. "So called Servitudes". *B.Y.I.L.*, vol. (1925), p. III; *The Law of Treaties.* Oxford, Clarendon press, 1961, p. 656;

[21] CASTREN, Eric J. S. "Aspects récents de la succession d'états". *R.d.C.*, 1951, vol I, p. 385 at p. 437.

[22] LESTER, A. P. "State Succession to Treaties in the Commonwealth". *I. & C. L. Q.*, vol. 12 (1963), p. 475, at p. 492.

[23] *Op. cit.* pp. 105-108.

"Les traités concernant les frontières ayant été mis en exécution en établissent une situation juridique détérminé, celle-ci doit être respectée par le nouveau souverain du territoire au même titre que tout pouvoir territorial étranger".

The present author wholly concurs with this opinion – in the present context, consideration of the conventional origin of the situation or of its territorial implications is superfluous.

ii) *State Practice.*

State practice in favour of the continuance in force of established boundaries appears to be such as to justify the conclusion that a general rule of international law exists to this effect, although unanimity in state practice is not as absolute as in jurisprudence on this topic[24].

Thus, the United States of America, although it did not regard itself as bound by treaties concluded by the United Kingdom, accepted the boundaries established prior to its advent to independence[25] and has maintained the same standpoint in similar occasions. As the U.S. Secretary of State declared in July 1856:

"The United States regard it as an established principle of public law and of international right that when a European Colony in America becomes independent it succeeds to the territorial limits of the Colony as it stood in the hands of the parent country. That is the doctrine which Great Britain and the United States concurred in adopting in the negotiations of Paris, which terminated this country's war of Independence"[26].

Accordingly, the United Kingdom, respecting the effect of the cession of Alaska to the United States by Russia in 1867, held the United States "bound by the recitals from the Convention of 1825. . . as far as the geographical limits of the ceded territory are concerned"[27]

Similarly, the boundary between Hanover and the Netherlands was accepted by Prussia after its annexation of the former in 1866[28].

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[24] First Report, *Op. cit.*, p. 17.

[25] WHARTON, F. *Digest of International Law of the United States.* 2nd. ed., 1887, section 6; McNair, *Law of Treaties*, p. 601.

[26] MOORE, John B. *A Digest of International Law.* Washington, Government printing office, 1906, Vol. I, p. 303; *MANNING'S Diplomatic Correspondence*, vol. 7 (Great Britain), Document 2767.

[27] *Infra*, note 75.

[28] KIATIBIAN, S. *Consequences juridiques des transformations territoriales des Etats sur les traités.* Paris, 1892. p. 31.

When Belgium became independent in 1830 the French boundary with the Netherlands became the Franco-Belge boundary. Thus, as O'Connell points out[29], France lists the treaty of Courtray of 1820 relative to the boundary between itself and the Netherlands in its treaties with Belgium. It also lists the same treaty as towards Luxembourg[30]. The same was recognized by the four powers which declared Belgium's independence[31].

State practice in the 19th century has, thus, been steady in accepting the rule laid down above. The practice in this respect has not been quite as unanimous contemporarily. Some new states, especially in Africa and Asia, express, in effect, doubts that the rule might be inconsistent with "the principle of self-determination recognized by the Charter"[32]. But, Sir Humphrey Waldock pointed out[33], the rule "does not touch the application of the principle of self-determination in any given case" and, indeed, it seems to be generally accepted[34].

Thus, when the United Kingdom government, in 1946, announced its intention to relinquish sovereignty over the Indian sub-continent, Afghanistan announced that the treaty signed between itself and Great Britain on November 12, 1893 which laid down the "Durand line" boundary[35] – as recognized by the parties in the treaty of Rawalpindi, August 8, 1919[36] and guaranteed by the treaty of Kabul, November 23, 1921[37] – would, in its view, lapse automatically with the transfer of sovereignty. The government of India denied this proposition.

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[29] O'CONNELL. *State succession in Municipal Law and in International Law*. vol. II, p. 274.

[30] BASDEVANT, J. *Traités et conventions en vigeur entre la France et les puissances étrangèrs*. vol. I, p. 322.

[31] CUKWURAH, p. 107.

[32] See *Yb. Int. Law Comm.*, 1966, vol. II, p. 259.

[33] First Report, *op. cit.*, p. 117.

[34] See *The Effect of Independence on Treaties*, *op. cit.*, pp. 361-366; United Nations Legislative Series. *Materials on Succession of States*. New York, United Nations Publications. 1967 (*ST/LEG/SER.B/14*), especially pp. 185-188, 189-190.

[35] *B.F.S.P.*, vol. 115, p. 1048.

[36] *Ibid.*, vol. 114, p. 174.

[37] *L.N.T.S.*, vol. 156, p. 276.

In the course of 1947, however, it became apparent from indications in the Afghan press and elsewhere that the Afghan government might base a claim to the North-West Frontier Province on the doctrine of *rebus sic stantibus*. Putting forward the argument that the boundary defined in Article 2 of the 1921 treaty had been agreed on the basis of the continuance of a certain state of facts, namely British rule in India, and that because of the grant of independence to India and Pakistan the 1921 treaty lapsed[38].

In 1949 the British Secretary for Commonwealth Relations, Mr Noel-Baker, stated in the House of Commons that:

> "His Majesty's Government in the United Kingdom have seen with regret the disagreements which there have been between the Governments of Pakistan and Afghanistan about the status of the territories on the North-Western frontier. It is his Majesty's Government's view that Pakistan is in international law the inheritor of the rights and duties of the old Government of India and of his Majesty's Government in the United Kingdom, in these territories and that the Durand Line is the international frontier"[39].

This view was repeated in 1956 and again in 1960 by the British Prime Minister[40].

Afghanistan, however, holds to its claim that Article II of the 1921 treaty, dealing with the so-called Durand line "which was imposed on Afghanistan in 1893. . . by political and military force"[41] has lapsed; *inter alia* because:

> "Afghanistan believes that colonial treaties which have been imposed by military force are invalid on the basis of the new waves of emancipation of colonial peoples in recent years"[42].

But Great Britain maintains that any executed clauses, such as those providing for establishment of an international boundary or, rather, what had been done already under executed clauses of the treaty, could not be affected by the splitting of the former India and the withdrawal of British rule from it, whatever the position of the Afghan treaty might be[43].

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[38] See *Materials on Succession of States, op. cit.*, p. 186.
[39] *House of Commons Debates.* vol. 466, pp. 1491-3.
[40] *Ibid.*, vol. 549, pp. 1367/8; vol. 623 p. 150.
[41] *Materials on Succession of States*, p. I.
[42] *Ibid.*, p. 3.
[43] *Ibid.*, p. 186.

On the topic as a whole, the Afghan government, in its reply to the I.L.C.[44], expressed the opinion that, as World War II brought a number of frontier changes, and many nations in Africa and Asia and other parts of the World achieved independence, new circumstances were created and it became necessary to find the effect of treaties after cession, annexation, fusion with another state, entry into federal union, dismemberment, partition, and finally separation or seccession. The solution of such difficulties, arising out of the results of colonialism and the imposition of territorial and boundary changes which were contrary to the will of the inhabitants and in contradiction to "the right of self-determination" should be used in question of re-organization accompanied by a change of sovereignty.

This is the typical argument of contemporary revisionist countries. As mentioned above[45], it was used by China in the current dispute with India, the Chinese resting their case, *inter alia*, on the ground that the MacMahon line was the product of imperialism[46]. India, however, has been insistent that, as Britain's successor, she has taken responsibility for the British treaties affecting her[47]. The same difficulties with China were experienced by Burma[48].

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As Cukwurah[49] points out, in almost every country in Africa today there are minority groups having racial, religious or tribal affinity with neighbouring countries. This situation arises from the unique nature of international boundaries accomplished in Africa during colonial days[50]. It is not uncommon, therefore, for the ancestral neighbours to demand new boundaries purely on one of these grounds[51]. These are genuine boundary problems, caused by the separating effect of international boundaries.

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[44] *Ibid.*, pp. 3/4.

[45] *Supra*, Chapter One, Section 2, A iii (b).

[46] *White paper no. 2*, p. 99. *Summary of the Report of the Officials on the Boundary Question, op. cit.*, p. 7.

[47] See Krishna Menon's speech in the Security Council, 3 and 4 May, 1962. *Foreign Affairs Record*, Special Supplement, May 1962.

[48] See SYATAUW, *Some Newly Established Asian States and the Development of International Law. Op. cit.*, pp. 155 ff.

[49] *Op. cit.*, p. 103.

[50] See LUCAS, C. P. *The Partition and Colonization of Africa.* Oxford, University Press, 1922.

[51] See TOUVAL, Saadia. "Africa's Frontiers, reactions to a Colonial Legacy". *International Affairs*. Oxford University Press, vol. 42 (1966), p. 641; PAYNE, R. H. "Divided Tribes: A Discussion of African Boundary Problems". *New York University Journal of International Law and Politics*. vol. 2 (1969), p. 243; CARRINGTON, C.E. "Frontiers in Africa". *International Affairs* (London), vol. 36 (1960), p. 424; KAPIL, R.C. "On the Conflict Potential of Inherited Boundaries in Africa". *World Politics*, vol. 18 (1966), p. 656.

Thus Somalia, in her boundary disputes with Ethiopia[52] and Kenya[53], refuses to recognize the validity of boundary treaties concluded by Great Britain and Italy, claiming that these are inconsistent with the right of self-determination of the Somali tribes in the areas under Ethiopian and Kenyan control[54]. Ethiopia and Kenya conversely stress the validity of these boundary treaties, which bind the successor states.

The general feeling in Africa, highly critical of colonial boundaries[55], culminated in the declaration at the All-African People's Conference in Accra in 1958, to the effect that the Conference:

> "(a) Denounces artificial frontier drawn by imperialist powers to divide the peoples of Africa, particularly those which cut across ethnic groups and divide people of the same stock;
> (b) Calls for abolition or adjustment of such frontiers at an early date"[56]

Subsequent developments, however, witnessed that diametrically opposed ideas were prevailing, for:

> "From the practical point of view it would indeed be difficult to contemplate sweeping aside these relics of colonial administration as that very act might involve just confusion and a weakness of the present superstructures in Africa . . . Therefore, the consolidation and utilization of what presently exists would seem a more reasonable approach"[57]

Indeed, the desirability of accepting existing boundaries was a view which gained prominance. At the 1964 Summit Conference of the O.A.U., accordingly, the Organization, with the dissent of Somalia, adopted a resolution by which member states pledged themselves "to respect the borders existing on their achievement of national independence"[58]. The majority of African states thus committed itself to accept boundaries as they existed at the time of independence and these states generally acceded to independence within recognized boundaries.

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[52] See BROWN, "The Ethiopia-Somaliland Frontier Dispute". *I.&C.L.Q.*, vol. 5 (1956), p. 245; *ibid.*, vol. 10 (1961), p. 167.

[53] PAYNE, *op. cit.*, pp. 255-262; CHARLIER, T. "A propos des conflits de frontières entre la Somalie, l'Ethiopia et le Kenya". *R.F.Sc.Pol.*, vol. 16 (1966), p. 310.

[54] See *The Somali People's Quest for Unity*. Published by the Foreign Relations Section of the Ministry of Foreign Affairs. Somalia, 1965.

[55] See CUKWURAH, pp. 36/37.

[56] For full text see LEGUM, C. *Pan Africanis*. London, Pall Mall Press, 1962; pp. 229-232.

[57] CUKWURAH, p. 149.

[58] O.A.U. Document *AGH/RES. 16(1)*, July 24, 1964.

iii) *Judicial Practice*

Jurisdiction also confirms the rule. Thus, in the case of the United States v Texas[59], the U.S. Supreme Court found that when Mexico became independent of the Spanish Crown, in 1824, the boundary line designated in the treaty of February 19, 1821, between the United States and Spain,[60] became the boundary between the United States and Mexico; likewise, the Court showed that when Texas became independent it inherited Mexico's boundary with the United States[61].

Similarly, the *Reichsgericht* in 1891 ruled that:

> "the boundary treaty concluded between the Duchy of Baden and the former kingdom of France remained in undisputed force after the German reich took over the rights of France by the incorporation of Alsace-Loraine"[62].

In his arbitral award of June 6, 1904 King Victor Emmanuel III of Italy stated that:

> "The right of the British State as the successor to Holland, to whom the Colony belonged, is based on the exercise of rights of jurisdiction by the Dutch West India Company"[63].

Likewise, in his boundary award concerning Costa Rica and Panama of March 17, 1910[64], E. D. White, Chief Justice of the United States, ruled that:

> "In doing so for the purpose of the rights with which this arbitration is concerned, Costa Rica will be taken as representing not only rights enjoyed by it in its name, but all those concerning the matter here in dispute which it possesses as the successor of a prior government, the Republic of Central America; and Panama will likewise be taken as representing for the same purpose, not only its own rights, but also those of its governmental ancestors, the Republic of Colombia, the Republic of New Granada, the United States of Colombia and the Republic of Colombia".

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[59] *U.S. Reports*, vol. 143 (1891) p. 621.

[60] *Ibid.*, p. 631.

[61] *Ibid.*, p. 633.

[62] *Fontes Juris Gentium*. Series A, Section 2, vol. I, p. 116.

[63] MARTENS, *N.R.G.*, 2e. sér., vol 32, p. 485, at p. 486; *B.F.S.P.*, vol. 19, p. 930, at p. 931; *U.N.R.I.A.A.*, vol. XI, p. II, at p. 22.

[64] See *A.J.I.L.*, vol. 8 (1914), p. 913.

The dispute between Cambodia and Thailand over the Temple of Preah Vihear had its *fons et origo* in the boundary settlements made in the period 1904-1908 between France and the latter disputant; for until Cambodia attained independence in 1953 she was part of French Indo-China and her foreign relations were conducted by France as the protecting power. Neither the parties nor the Court questioned the rule herein under discussion in this context. In fact, the Court dealt mostly with the boundary treaty concluded in February 1904 and in subsequent events concerning the boundary in question. The Court founded its judgment on the succession by Cambodia to the rights granted to France under the treaties in question and thus tacitly accepted the rule of state succession in relation to international boundaries[65].

## B. *NATURE OF THE CONCEPT: SEVERABILITY OF TREATY PROVISIONS REGARDING BOUNDARIES*

In 1961 the International Law Association established a Committee of fourteen members to study the subject of "the succession of new states to the treaties and certain other obligations of their predecessors"[66].

At the 53rd Conference of the Association, held at Buenos Aires in September 1968, the Committee presented an interim report in which it submitted a draft of nine resolutions for adoption by the Association[67].

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[65] See also case of the Free Zones of Upper Savoy and the district of Gex (1932) (*P.C.I.J., Series A/B, No. 46*), in particular p. 145; and see Digest of the Decisions of International Tribunals Relating to State Succession: Study prepared by the Secretariat. United Nations, General Assembly Document *A/CN. 4/151 (Yb. Int. Law Comm.*, 1962, vol. II, p. 131).

[66] It should be noted, however, that the Association takes as its starting point a presumption of the continuity of all the predecesor state's treaties which were in force with respect to the territory at the date of succession and under its resolutions both bilateral and multilateral treaties are to become binding on a new state unless, within a reasonable time, the latter contracts out by declaring that the particular treaty is not regarded by it as any longer in force. For this purpose the Association makes no distinction between treaties of a territorial character and other treaties; and thus does not endorse the doctrine that treaties of a territorial character form a special class which are automatically binding *ipso jure* upon a successor state. See Fifth Report on succession in Respect of Treaties by Sir Humphrey Waldock, Special Rapporteur of the I.L.C. U.N. Doc. *A/CN. 4/256 Add 4*, pp. 12/13.

[67] See *A/CN. 4/212*, p. 8.

Resolution No. 8 which, as most of the other resolutions, was accepted by the Association without amendment, reads:

> "8. When a treaty which provides for the delimitation of a national boundary between two states has been executed in the sense that the boundary has been delimited and no further action needs to be taken, the treaty has spent its force and what is succeeded is not the treaty but the extent of national territory thus delimited; . . ."[68]

The Association thus endorsed the doctrine claiming that once a boundary is established by treaty, it loses its contractual character; "There is in such cases, not really succession, or even continuity, of treaty relationship"[69].

Indeed, already in 1931, in his commentary on the project of articles on states succession submitted by Cavaglieri to the Institute of International Law, Winiarski distinguished clearly the problem of respect of established boundaries from the problem of treaty devolution:

> "Le traité, qui avait opéré les modifications territoriales et fixé les frontières existantes, ce traité lui-même n'existe plus au moment de l'annexion; ses dispositions avaient été éxecutées par-là même consomées; depuis, la frontière existe non pas en vertu d'un traité à effet continu, mais simplement parce que le territoire ainsi délimité fait partie de l'Etat en question, que cet Etat y exerce sa Souveraineté de facto et de jure et que cette situation juridique est opposable à tous. Le traité qui avait fixé la frontière n'a désormais qu'une valeur historique. En cas de doute sur le tracé exact de cette frontière, il peut être invoqué comme document; s'agit-il de savoir si la portion contestée du territoire appartient en droit a un Etat, alors il constitue une preuve; mais c'est tout"[70].

Many writers uphold the same doctrine.

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[68] *Ibid.*, p. 10.

[69] "*The effect of Independence on Treaties*". A Handbook prepared by the Committee on State Succession to Treaties and other Governmental Obligations and published under the auspices of the International Law Association. London, Stevens & Sons, 1965, p. 352.

[70] See *Annuaire de l'Institut de Droit International*, 1931, pp. 238/9; see also Cavagieri's report, to the effect that: "Lorsqu'un Etat a des frontières reconnues, le traité qui les a fixées n'a plus qu'une valeur historique. Le territoire, délimitée par elles, fait partie de l'Etat, qui y exerce sa Souveraineté de jure et de facto. Les traités qui ont délimité ces frontières ne peuvent donc pas être rangés dans la catégorie spéciale de traités réels, et leur survivance à l'Etat disparu ne peut pas être l'objet de discussions" (*ibid.*, p. 255).

Thus, O'Connel writes that the fact that a successor is bound by pre-independence boundaries is not a problem of state succession and still less of the law of treaties[71]. McNair observes that boundary agreements, upon execution, operate as a kind of conveyance[72]. "A successor state", remarks Lester[73], "then succeeds not to the treaty but to the frontiers of its territory, as it does to the other facts of its new international life". "Une fois fixée par traité", states Pereira[74], "les frontières perdent leur nature contractuelle et le nouvel Etat ne succede pas en droit au traité de frontière, mais exerce sa juridiction territoriale dans les mêmes limites que son prédécesseur". "It follows", concludes Cukwurah[75], "that once the boundary provisions are executed, they lose their contractual character and may be severed from additional provisions, other than those delimiting the line. But this will not preclude the parties from citing the contents of the treaty, where relevant, as the *indicia* of title, in any subsequent controversy".

It seems that Dr. Travers Twiss, the Queen's Advocate, had the same view in mind when he produced his report of December 26, 1887, on the effect of a boundary treaty concluded in 1825 between Great Britain and Russia, relating to Alaska, on the relations between the United States and Great Britain after cession of Alaska by Russia to the former state. "I have taken this matter into consideration" declared the Queen's Advocate "and have the honour to report:

> That the United States are bound by the recitals from the Convention of 1825 which are incorporated into the Treaty of Cession, as far as the geographical limits of the ceded territory are concerned. Those recitals, although they do not constitute any direct Treaty engagement between Great-Britain and the United States, make Articles III and IV of the Convention of 1825 evidence against the United States, that Great-Britain has an established title to the line of demarcation described in these Articles; but as regards the other Articles of the Convention, whereby certain points connected with the commerce, navigation, and fisheries, of British and Russian subjects were settled for their reciprocal convenience, none of the obligations contracted by Russia towards Great-Britain under these Articles devolve upon the United States by virtue of the Treaty of Cession"[76]

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[71] O'Connel, D. P., *The Law of State Succession*. Cambridge, Cambridge University Press, 1956; p. 49.

[72] McNAIR, Arnold D. "So Called Servitudes". *B.Y.I.L.*, 1925, p. III.

[73] LESTER, A. P. "State Succession to Treaties in the Commonwealth". *I.&C.L.Q.*, vol. 12 (1963), p. 475, at p. 492.

[74] PEREIRA, André G. *La succession d'Etats en matiére de traité*. Paris, A. Pedone, 1969, p. 110.

[75] *Op. cit.*

[76] *Foreign Office 83/2225*. Reproduced by McNAIR, *The Law of Treaties*, p. 657; and compare Report of the Law Officers of the Crown, April 23, 1898. *Foreign Office Confidential Papers* (7199) in O'Connel, *op. cit.*, p. 373.

The question of the severability of treaty provisions regarding boundaries arose more recently in the dispute between Ethiopia and Somaliland respecting the Somali grazing rights as secured by an exchange of notes annexed to the British-Ethiopian boundary treaty of 1897[77], which demarcated the boundary between Ethiopia and Somaliland. This exchange of letters provided that tribes on either side of the boundary shall be free to cross it for the purposes of grazing[78]. These rights were confirmed by Article III of a further treaty between Britain and Ethiopia in 1954[79]. At the time, the agreement was opposed by the Somalis, who petitioned the United Nations.

When British Somaliland became independent in 1960, Ethiopia gave notice that it would heneceforth regard the grazing right as no longer valid[80]. British practice in this case indicated that boundary provisions are regarded as executed and severable.

Thus, at the Constitutional Conference of 1960 preceding independence, the United Kingdom Secretary of State for the Colonies said that, in the view of his government, the treaty of 1897 should be regarded as remaining in force between Ethiopia and the successor state. But that the main provisions of the Anglo-Ethiopian agreement of 1954, concerning grazing rights, would lapse[81]. In a statement in the House of Commons on April 11, 1960, the British Prime Minister repeated this statement, adding that "Article III of the 1954 agreement, which comprises most of what was additional to the 1897 treaty, would in our opinion lapse"[82].

State practice seems, thus, to confirm the opinions of those authors who hold that the obligation of new states to respect boundaries traced by their predecessors does not by itself imply the devolution of the treaties which established these boundaries.

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[77] Treaty of Addis Abeba, May 14, 1897. *B.F.S.P.*, vol. 89 (1897), p. 31.
[78] *House of Commons Debates*, 5th, Series. vol. 537, Columns 1683-1684 (1954-1955).
[79] *B.F.S.P.*, vol. 161, p. 93.
[80] LESTER, *op. cit.*, p. 493. ff.
[81] *Cmnd.* 1044, p. 833.
[82] *House of Commons Debates.* 5th. Series. vol. 621, p. 105.

## C. *ADMINISTRATIVE BOUNDARIES*

Although modern practice, especially in Africa, may in the future prove the contrary, it is submitted that the rule under examination herein does not apply to administrative boundaries. The administrative boundary is not an institution of international law, but of public municipal law and does not devolve, therefore, on successor states by virtue of general international law. The notion of stability applies to established boundaries, not to situations of no internationally consensual basis.

A derogation to general international law in this context is the Latin-American principle of *uti possidetis,* according to which the new-born states of the continent adopted as a basis for their boundaries the Spanish colonial administrative divisions. This doctrine is considered

> "a principle by which the American Republics have decided to adjust their boundary differences. But in no case has the International Community regarded, as an institution of international law, the principle of *uti possidetis*. . . it remains. . . derogatory to general international law. . . binding only those states which have, by a Convention, expressly agreed to it"[83].

In view of contemporary practice, especially in Africa, where former colonial administrative divisions are usually accepted as a basis for boundaries between newly established states, the question of the normative content of *uti possidetis* acquires new dimensions. It is, therefore, impossible today uncritically to accept the earlier view that it is a Latin-America peculiarity. The doctrine is accordingly examined, in the following section, in a wider context.

[83] BLOOMFIELD, L. M. *The British Honduras – Guatemala Dispute.* Toronto, 1953; p. 94.

## SECTION 2. UTI POSSIDETIS

### A. *Latin-America*

The term "*uti possidetis*" is derived from Roman Civil Law in which it denoted a preservation, pending litigation, of an existing state of possession of an immovable "*nec Vi. nec Clam, nec Precario*", as between opposing claimants.

The transposition of this term in the context of Latin-America's boundary-making process has, however, no relation to the interdiction of Roman Law, for it was used to express the intention of Latin-American countries, formerly part of the Spanish colonial Empire, that their international boundaries should follow the former colonial administrative divisions[84]. Thus, when Spanish rule in Latin-America collapsed, the successor states tended to follow the lines of cleavage and the products of colonial administrative delimitations were admitted as international boundaries[85].

The principle was proclaimed by the Congress which met at Lima in 1848 in the so-called "Treaty of Confederation"[86]. Article I of this treaty proposed to prevent conflicts between the confederates (New Granada, Ecuador, Peru, Bolivia and Chile), especially those arising out of boundary disputes, establishing for that purpose that, in default of special stipulations between the interested states, the boundaries should be those possessed by the respective countries in the epoch of their advent to independence[87]. Though the doctrine has become somewhat discredited because of its ambiguities and indefinite character[88], it has been generally accepted by Latin-American states and can, therefore, be considered as a solid legal principle in this part of the globe[89]. We hereby proceed to examine its object and scope.

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[84] See MOORE, J. B. *Costa Rica - Panama Arbitration, Memorandum on uti possidetis.* Rosslyn, Va. Commonwealth Co. 1913; ALVAREZ, Alejandro. *Le Droit International Americain;* Paris, A. Pedone, 1910; BOGGS, *International Boundaries,* p. 79 ff; AYALA, "Uti Possidetis". *Journal of the Academie Diplomatique Internationale.* Paris, December 1931, p. 249; GUANI, A. "La solidarité dans l'Amerique latine". 8 *R.d.C.,* (1925), vol. III, p. 207, at pp. 293-310.

[85] See, for example, Venezuelan constitution of 1830 (*B.F.S.P.,*), vol. 44, p. 1119); Honduran constitution of 1839 (SALAZAR and HYDE, *The Case for Guatemala,* Washington, 1932, pp. 30-34); when Ecuador separated from Colombia the boundary between them was declared to be the line which had "separated the provinces of the ancient Department of the Cauca from that of Ecuador" (*B.F.S.P.,* vol. 20, pp. 1206/7; and see generally IRELAND, *op. cit.*)

[86] See ALVAREZ, Alejandro. "Latin America and International Law". *A.J.I.L.,* vol. 3, at p. 280.

[87] For texts see ARANDA, Ricardo. *Congres et Conférences auxquelles le Péru a pris part.* Lima, 1909. pp. 164-171.

[88] See LAPRADELLE, *La Frontière,* p. 86.

[89] See ALVAREZ, *Le Droit International Americain, op. cit.,* pp. 65-68; BOGGS, *International Boundaries,* p. 79.

At its inception the doctrine of *uti possidetis* had, undoubtedly, a political, anti-colonialist orientation[90]. As the Swiss Federal Council explained in its arbitral award of March 24, 1922 concerning certain boundary questions between Colombia and Venezuela[91]:

> "When the Spanish Colonies of central and south America proclaimed their independence in the second decade of the nineteenth Century, they adopted a principle of constitutional and international law to which they gave the name of *uti possidetis juris* of 1810 for the purpose of laying down the rule that the boundaries of the newly established republics should be the frontiers of the Spanish pronvinces which they were succeeding. This general principle offered the advantage of establishing an absolute rule that in law no territory of the former Spanish America was without an owner. Although there were many regions that were unexplored or inhabited by uncivilized natives, these regions were regarded as belonging in law to the respective republics that had succeeded the Spanish provinces to which these lands were connected by virtue of old Royal decrees of the Spanish mother country. These territories, although not occupied in fact, were by common agreement considered as being occupied in law by the new republics from the very beginning. Encroachments and ill-timed efforts at colonization beyond the frontiers, as well as *de facto* occupation, became ineffective and of no legal consequence. This principle also had the advantage, it was hoped, of doing away with boundary disputes between the new states. Finally it put an end to the designs of the colonizing states of Europe against lands which otherwise they could have sought to proclaim *res nulius*. The international status of Spanish America was from the very beginning quite different from that of Africa for example. This principle later received general sanction under the name of the Monroe Doctrine, but had long beofre been the basis of South American public law".

The original aim of the doctrine once having been attained, and the independence of the different republics having been successively recognized, the principle became a rule governing delimitations between the newly-established Hispano-American states. "Dans un problème aussi complexe que celui de la frontière, ou la recherche d'une formule nouvelle et ses tentatives d'application risquent généralement d'engendrer les discussions et les retards, l'*uti possidetis* offrait en apparence l'avantage d'une solution toute prête"[92].

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[90] See GUANI, *op. cit.*, p. 296; LAPRADELLE, *La Frontière*, pp. 76-8.

[91] *Sentence arbitrale du Conseil Fédéral Suisse sur diverses questions de limites pendantes entre la Colombie et le Venezuela.* Berne, 24 Mars 1922. Neuchâtel, Imp. P. Attinger, 1922, pp. 5/6. SCOTT, James B. "The Swiss Decision in the Boundary Dispute between Colombia and Venezuela". *A.J.I.L.*, vol. 16 (1922), p. 428; see also dissenting opinion of Judge Urrutia Holguin in the case concerning the Award of the King of Spain., *I.C.J. Reports*, 1960, p. 192, at. p. 226.

[92] LAPRADELLE, *La Frontière*, p. 79.

The underlying considerations thus seem to favour the concept of *uti possidetis juris,* that is, the theory that it is administrative boundaries as theoretically defined in Spanish Royal decrees which were succeeded to[93], at the expense of the rival conception, that of the *uti possidetis de facto*; that is, that succession was in relation to the boundaries actually respected by the former colonial administration.

Ardent polemics, propelled by conflicting national interests were, however, aroused by champions of one or the other theory[94], thus adding to the confusion and ambiguity of the whole doctrine, so that Lapradelle could describe it as discredited and worth discarding altogether[95]. Indeed, the assumption involved in the original use of the doctrine that it was possible to trace, by a study of Spanish decrees, the precise lines of division of the former administrative units was rarely warranted by realities since it was rare that these were clearly defined by the Spaniards[96]. Uncertainty thus prevailed over the whole proceedings[97], and this resulted in a series of boundary disputes[98].

In many instances the arbitrators appointed to settle these disputes were called upon by the parties to apply the rule of *uti possidetis* of the time of independence (1810 for South America and 1821 for Central America). But, as Cukwurah points out[99], by submitting these disputes to arbitration, the disputant states, while retaining the principle as the basis for decision, generally allowed the Tribunals some discretionary powers in circumstances beset with inherent defects.

The following perusal of some case material might elucidate the matter as a whole.

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[93] See *I.C.J. Reports*, 1960, *loc. cit.*

[94] See FISHER, F. C. "The Arbitration of the Guatemelan-Honduran Boundary Dispute". *A.J.I.L.*, vol. 27 (1933), p. 403, at p. 416.

[95] *La Frontière*, p. 86.

[96] See IRELAND, *op. cit.*

[97] See CUKWURAH, p. 114.

[98] See WOOLSLEY, "Boundary Disputes in Latin America". *A.J.I.L.*, vol. 25 (1931), p. 324.

[99] *Op. cit.*, p. 190.

The pivot case is the Guatemala-Honduras boundary arbitration[100].

In this case the Tribunal found itself confronted at the outset with the doctrine of *uti possidetis*, accepted by both parties as "the only juridical line which can be established between their respective countries"[101].

The parties differed, however, as to the test to be applied in determining the *uti possidetis* of 1821 alignment. Whereas Guatemala contended for the concept of *uti possidetis de facto,* Honduras, on its part, claimed the rival doctrine. Both parties invited attention to the historic utilization of the phrase "*uti possidetis*" in Latin-American boundary settlements[102]. But an examination of the historic use of the term and of the views of jurists as to its use was said by the Tribunal not to reveal such a consensus of opinion as would establish a definite criterion for its interpretation in the applicable texts[103].

The Tribunal thereafter established the following criterion:

> "The expression '*uti possidetis*' undoubtedly refers to possession. It makes possession the test. In determining in what sense the parties referred to possession, we must have regard to their situation at the moment the colonial regime was terminated. They were not in the position of warring states terminating hositilities by accepting the status of territory on the basis of conquest. Nor had they derived rights from different sovereigns. The territory of each party had belonged to the Crown of Spain. The ownership of the Spanish monarch had been absolute. In fact and law, the Spanish monarch had been in possession of all the territory of each. Prior to independence, each colonial entity being simply a unit of administration in all respects subject to the Spanish King, there was no possession in fact or law, in a political sense, independent of his possession. The only possession of either colonial entity before independence was such as could be ascribed to it by virtue of the administrative authority it enjoyed. The concept of '*uti possidetis* of 1821' thus necessarily refers to an administrative control which rested on the will of the Spanish Crown. For the purpose of drawing the line of 'uti possidetis of 1821' we must look to the existence of this administrative control. Where administrative control was exercised by the colonial entity with the will of the Spanish monarch, there can be no doubt that it was a juridical control, and the line drawn according to the limits of that control would be a juridical line. If, on the other hand, either colonial entity prior to independence had asserted administrative control contrary to the will of the Spanish Crown, that would have been mere usurpation, and as, *ex hypothese*, the colonial regime still existed and the only source of authority was the Crown. . . such usurpation could not confer any status of 'possession" as against the Crown's possession in fact or in law"[104]

[100] See *U.N.R.I.A.A.*, vol. II, p. 1309; FISHER, *op. cit.*
[101] *Ibid.*, p. 1322.
[102] *Loc. cit.*
[103] *Ibid.*, p. 1323.
[104] *Ibid.*, p. 1324.

The Tribunal, thus rejecting the consideration of administrative control exercised against the will of the Crown, apparently espoused the "uti possidetis juris" doctrine, placing, nonetheless, the greatest emphasis on the fact of possession rather than on abstract titles. The Tribunal's criterion in fact amounted to an assertion that the principle of *uti possidetis* required the restriction of the territorial sovereignty of Latin-American nations to areas rightfully occupied by the administrations of the antecedent colonial units.

In the application of the bi-focal criterion thus established, evidence must be sought, the Tribunal held, of administrative control as of 1821, the year of independence. Such evidence is to be found not only in express manifestations of the will of the Spanish crown in laws, rescripts and decrees, but also, in the absence of such, in "conduct indicating Royal acquiescence in colonial assertations of administrative authority"[105], as the crown was at liberty at all times to change its commands or to interpret them by allowing what it did not forbid[106].

Upon an analytical consideration according to the criterion it established, the Tribunal was able to trace, with occasional gaps, the *uti possidetis* of 1821 alignment from a point about eight miles from the Salvadoran boundary to Cerre Bonbasco. Beyond this point, however, the record disclosed no colonial land grants in the disputed territory, or any other evidence of official delimitation, and so afforded, as the Tribunal found, no basis for establishing this alignment[107]. But the Tribunal made use of the discretionary powers it deemed to have possessed by virtue of the arbitration agreement[108]. It again placed emphasis on physical facts, holding that it must have regard, in fixing the boundary "(1) to the facts of actual possession; (2) to the question whether possession by one party has been acquired in good faith, and without invading the right of the other party; and (3) to the relation of territory actually occupied to that which is not yet occupied"[109]. The boundary was established accordingly.

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[105] *Loc. cit.*

[106] And see *supra*, chapter one, section 2, B (ii)

[107] *Op. cit.*, pp. 1325-1351.

[108] *Op. cit.*, p. 1352.

[109] *Loc. cit.*

In the arbitration between Bolivia and Peru both parties insisted that the arbitrator should decide in conformity with the principle of *uti possidetis* of 1810[110]. They further provided, however, that: "whenever the Royal enactments or dispositions do not define the rights of possession to a territory in a clear manner, the arbitrator shall decide the question equitably, keeping as far as possible to their meaning and to the spirit which inspired them"[111]. The arbitrator was, moreover, especially instructed to act in conformity with all the documents of official character which could attest to the true signification of relative Royal enactments[112].

Although both parties claimed and described *uti possidetis* alignments[113], the arbitrator ruled that in view of the lack of sufficient grounds for considering as the boundary either of the lines claimed by the parties (as the zone in dispute was in 1810 completely unexplored and that, therefore, its boundaries had not been fully determined) he had to invoke Article 4 of the treaty of 1902 and decide the question "equitably"[114]. This decision was strongly criticised thereafter.

Formerly, in the similar Colombia-Venezuela Boundary Arbitration[115], the arbitrator, by virtue of a supplementary protocol signed by the parties on February 15, 1886 at Paris[116] – which stipulated that he had the power to decide "upon such line of action as may be most in accordance with existing documents, whenever any point may arise about which there is not all the clearness that is desireable" – decided the boundary in those portions where the *uti possidetis* line could not be established, using discretionary powers.

Liberal interpretation as to the competence of arbitrators thus served, in all these registered cases of adjudication involving application of the principle of *uti possidetis,* to overcome difficulties inherent to the concept.

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[110] Article I, Treaty of December 20, 1902. *U.N.R.I.A.A., Vol. XI, p. 141; B.F.S.P.*, vol. 105, p. 572.

[111] *Ibid.*, Article 4.

[112] *Ibid.*, Article 3.

[113] See *A.J.I.L.*, vol. 3 (1909), pp. 1030/1.

[114] *Ibid.*, pp. 1032-1035/6.

[115] See *R.G.D.I.P.*, vol. 17 (1910), p. 253 ff; MOORE, *International Arbitrations,* vol. 5, p. 4858.

[116] Protocol representing the interpretation of Article I of the Treaty of September 14, 1881. *B.F.S.P.*, vol. 77, p. 1012.

Whereas Brazil, in its relations with its neighbouring countries, succeeded to international boundaries, not to administrative divisions, the doctrine of *uti possidetis* is irrelevant in this context, for the above-mentioned rule of general international law should apply. Some Hispano-American states pointed out, in fact, that the principle of *uti possidetis* had no proper place but between countries derived from Spanish sovereignty[117].

Brazil, however, maintained that:

> "The *uti possidetis* of the period of independence of the South American nations and such provisions of the treaty of 1777[118] as were not in conflict with that *uti possidetis* were the only guides as to the limits between Brazil and the adjoining states of Spanish origin"[119].

Being advocate of the *uti possidetis de facto* doctrine, Brazil thus arised unnecessary boundary disputes with some of its neighbours[120]; for the rule of state succession in regard to international boundaries applies to abstract, established titles, not to physical situations of no consensual basis[121]. Indeed, in this respect the *uti possidetis* rule – as the Tribunal in the above related to Guatemala-Honduras arbitration made it clear – is no exception.

## B. *MODERN AFRICA*

As was mentioned above[122], boundary problems in modern, independent Africa arose from the outset on the ground of polemics between the respective champions of revisionism and stability. The latter doctrine seems to have won the upper hand, and the concept of stability later evolved to include also the notion of *uti-possidetis*, as stability is generally understood in Africa to relate to all sorts of colonial territorial divisions[123].

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[117] See, for example, Peru's objection to the treaty of La Paz, March 27, 1887 (*B.F.S.P.*, vol. 59, pp. 1161-1169; MARTENS' *N.R.G.*, vol. 20, pp. 613-621) which recognized as a basis for the boundary between Brazil and Bolivia the *uti possidetis* and accordingly defined the boundary. *Annuario. Admin. de 1868*, Ed. Off. (La Paz), appen., pp. 385-404 (cited by IRELAND, Boundaries, etc., in Latin America, *op. cit.* p. 42).

[118] See *B.F.S.P.*, vol. 6, p. 700.

[119] MOORE, *International Arbitrations*, vol. 2, p. 1991.

[120] See LAPRADELLE, *La Frontière*, pp. 79-83.

[121] *Supra*, chapter one, section 2, A (iv).

[122] *Supra*, p. 174 ff.

[123] *Cf.* VERZIJL, *op. cit.*, pp. 519-521; VAN DUNEM, de França Dias F. J. *Les frontièrs Africaines* (Thesis). Marseilles-Aix, 1969.

As a matter of fact, the principle of *uti-possidetis* was not totally unknown in Africa, even in the colonial period. It was applied in the 19th century, especially in North Africa, upon the decomposition of the Ottoman Empire, and was later invoked under the mandatory *régime* of the League of Nations[124].

In contemporary Africa, however, the concept of *uti-possidetis*, which was borrowed from Roman law and followed in post-colonial Latin-America, had an especially African genesis and function.

First, it should be noted that, in contradistinction to the situation prevailing in Latin America, where most of the states adhere to the civil law legal system, Africa does not form a coherent legal community of which the various legal systems are component parts with a fundamental similarity one with another. This heterogeneity obviously renders difficult the adoption of any clear-cut, generally accepted doctrine of law in Africa; the notion of *uti-possidetis* has, therefore, a wider and less precise connotation in modern Africa then in Latin America. Notably, the African conception seems to relate to all sorts of colonial divisions, without major distinctions of origin.

Secondly, whereas the doctrine of *uti-possidetis* had, in Latin America, an anti-colonialist orientation at its inception[125], the transposition of this notion in the context of Africa's boundary problems, translating into legal terms the interest of African states in the preservation of the *status quo*, was inconsistent with the anti-colonial nationalist ideology current in Africa. Indeed, the prevailing ideas and values among nationalist leaders at the time of independence predisposed them to a critical attitude towards the borders which their states inherited, those borders being part of the colonial legacy. The doctrine of *uti-possidetis* was, thus, legitimized in contemporary Africa on a background totally different from that of 19th century Latin America[126].

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[124] *Cf.* YAKEMTCHOUK, Romain. *L'Afrique en droit international.* Paris, Librairie générale de droit et de jurisprudence, 1971; pp. 83-85.

[125] *Cf.* WIDSTRAND, Carl G. *African Boundary Problems.* The Scandinavian Institute of African Studies, Uppsala, 1969; 202 p.

[126] *Cf.* TOUVAL, Saadia. "Africa's Frontiers: Reactions to a Colonial Legacy". *International Affairs*, vol. 4 (October 1966), pp. 641-54.

The need of the majority of African states to define themselves by colonial boundaries led them to the realization that they had a mutual interest in establishing respect for the *status quo*. Reciprocal respect for boundaries and abstinence from irredentism, on the basis of the formula *cuius regio, eius natio*, thus underlay the establishment of the principle of the preservation of the territorial *status quo* through an original system of international law; not on the basis of respect for classic international law, as the law of state succession did not well accord with nationalist ideology and was therefore regarded obsolete, but on converging the legitimization of the *status quo* with the consolidation of states. In many instances what were previously only internal administrative borders thus up-graded to the status of international boundaries; e.g. the boundaries of the former French speaking West African states. As less care had been taken to delimit, and no arrangement at all to demarcate such administrative borders during the colonial period was probably made, the number of disputes is great[127].

Article III, paragraph 3, of the Charter of the OAU pledges member states "to respect for the sovereignty and territorial integrity of each state and for its inalienable right to independent existance". The OAU thus committed its members to the *status quo* principle in the above explained connotation, and opted for the *uti-possidetis* principle in boundary cases with which it came to deal.

For example, in relation to the conflict between Morocco and Algeria, the OAU has been instrumental in inducing the parties to a military standstill. The Council of Ministers of the OAU, at its Addis Ababa meeting, referred specifically to Article 3 of the OAU charter. The OAU also proceeded to defend the *status quo*, on the basis of its charter, on other occasions, involving international, not administrative boundaries; and this upon the same basic considerations.

[127] Inter-African boundary disputes include, *inter alia*: Moroco-Algeria, 1956-1972; Tunisia-Algeria, 1956-64, 1966; Morocco-Mali, 1956-65; Ghana-Ivory Coast, 1959-66; Mali-Upper Volta, 1963; Niger-Upper Volta, 1963-64; Dahomey-Niger, 1963-66; Kenya-Zanzibar, 1963; Kenya-Uganda, 1962; Cameroun-Gabon, 1960.

In its special African connotation, relating to territorial rather then to boundary problems proper, *uti-possidetis* may, therefore, be regarded as generally acceptable in Africa. This, however, did not prevent disputes. Indeed, in Africa, historic claims based on the principle of colonial *uti-possidetis* have an especially strong case, since the successor state notion is the primary juridical justification for any boundaries in Africa today. Thus, if the independent state can establish that the colonial boundaries were more extensive than current ones, a *prima facie* case can be made for rectification. Some boundary disputes arose on such background[128]. In one notable case (Morocco-Algeria dispute) one party invoked pre-colonial *uti-possidetis*. Indeed, Morocco claimed that historic boundaries were violated by French colonialism, which usurped part of her national territory. Her irredentism is thus explained by positing the unique continuity of the Sherifian Empire through the colonial protectorate, not upon the argument of the necessity to legitimize colonial divisions.

The case of Morocco, legitimized by the principle of the continuity of the historic Moroccan state, is an exception among revisionist African states; indeed, rather then affirm *uti-possidetis* in the context of the pre-colonial situation other irredentist African states refute this doctrine. These countries notably include the Somali Republic, Ghana and Togo.

Thus, Somali irredentism, as explained above, is based on an ethnic-cultural nationalism. The irredentism of Ghana and Togo is reciprocal, the second state argues for the restoration of the boundaries as they had been during the period of German rule, while the first contends for the annexation of Togo by Ghana; the main prop in both cases being the quest of the Ewe people for unification.

On the whole it should be noted that the situation in modern Africa, in regard to the principle of uti-possidetis, is rather inconclusive; that this principle has a special connotation in the continent which is hardly capable of generalization in the present state of the general law of international boundary delimitation; that the question of the normative content of this principle in its foregoing African manifestations must be approached cautiously, as practice in Africa yet fails to prove the necessary *opinio juris*. The question, although theoretically settled in principle, seems to be still open in practice; this does not yet permit the conclusion that administrative

[128] Between Ghana and Upper-Volta, 1966; between Sudan and Ethiopia; between Mali and Southern Mauritania (this involved a former administrative border, which was corrected in February 1963, modifying internal French decrees).

lines of division devolve upon successor African states by virtue of the same mandatory rule which has been accepted in Latin America. Existing legal material could be considered, at the utmost, as the expression of that rule *in fieri et in status nascendi* in Africa today.

### 3. *MARITIME BOUNDARIES*

Practically, the establishment of water international boundaries is usually undertaken in order to facilitate the exercise of territorial jurisdictions rather than with a view to separation between these. This latter function, the primary characteristic of the land international boundary, is less important, being in most cases fulfiled by nature, the water feature itself constituting a frontier, separating zone. The usefulness, practically speaking, of establishing linear boundaries with an intention to achieve a complete, clear-cut separation is therefore reduced in such cases.

Thus, in relation to international rivers, no mandatory legal rules apply in the present context although many methods of delimitation have been used in practice[129]. This fits, *mutatis mutandis,* to the "thalweg" formula[130], which has generally been applied in practice for rivers in which navigation is an important factor[131], as well as to the complementary method of the "median line" boundary[132]. Although the doctrine is far from being unanimous on the question[133] and the thalweg-median line formula has been

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[129] See BOUCHEZ, L. J. "The Fixing of Boundaries in International Boundary Rivers". *I.&C.L.Q.*, vol. 12 (1963), pp. 789-817.

[130] The term, derived from the German, means: the channel continuously used for navigation. The thalweg, however, is not a boundary line but in fact a boundary zone, because the channel of a river is never a precise line. See BOUCHEZ, *ibid.*, p. 793; LAPRADELLE, *La Frontière*, pp. 202-204.

[131] See, for example, LAUTERPACHT, Elihu. "River Boundaries: Legal aspects of the Shatt-Al-Arab Frontier". *I.&C.L.Q.*, vol. 9 (1960), p. 208 at pp. 216-222; see also Article 30, Treaty of Versailles, 1919: "In the case of boundaries which are defined by a waterway, the terms "course" and "channel" used in the present treaty signify: in the case of non-navigable rivers, the median-line of the waterway on its principal arm, and, in the case of navigable rivers, the median line of the principal channel of navigation".

Articles 30 of the Treaty of St. Germain; 30 of the Treaty of Neuilly; 30 of the Treaty of Trianon and 30 of the Treaty of Sèvres are almost identical.

[132] This notion differs geometrically from the thalweg concept, the latter having width as well as length while the former is a purely linear construction.

[133] See, for example, GARNER, James W. "The Doctrine of the Thalweg". *B.Y.I.L.*, vol 16 (1935), p. 177; OPPENHEIM, L. *International Law*, 8th. ed., edited by LAUTERPACHT, H. London, Longmans, Green and Co., 1955, pp. 532/3; COLOMBOS, John C. The International Law of the Sea. 5th. ed., London, Longmans, 1962, p. 204; STUYT, A.M., *The General Principles of Law.* The Hague. Martinus Nijhoff, 1946, pp. 27-33; LAPRADELLE, *La Frontière*, p. 206.

proposed as a rule of international law[134], it is submitted that it is not substantive but, at the utmost, merely a rule of interpretation[135]. An extensive examination of this formula is therefore superfluous.

In contradistinction to other sorts of water boundaries, the establishment of maritime international boundaries involves community interests of the highest order[136], hence the only attempts at codification in relation to delimitation were made in this domain.

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The problem of delimitation of maritime international boundaries[137] is quadriform.

Present between adjacent as well as opposing littoral states, it appears in relation both to the territorial sea and to the continental shelf.

Although, as is demonstrated below, solutions adopted are largely similar, the considerably distinct character of these notions prescribes their separate examination hereunder.

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[134] See, for example, Project No. 10 of the American Institue of International Law. *A.J.I.L.*, vol. 20 (1926, Special Supplement No. 2), p. 318. Article 4 reads:

> "If the boundary is a non-navigable river, the middle shall be the divinding line, if there is no provision or practice to the contrary.
>
> If the river is navigable the boundary is, in the absence of an agreement or practice to the contrary, a line through the middle of the deepest or most navigable channel."

[135] This is obviously the meaning of Article 30 of the post world war peace treaties as cited above and the term was likewise used in adjudication in the context of interpretation of boundary agreements, exclusively (see examples in STUYT, the general principles, *op. cit.*, pp. 27-33; also in GARNER, James W. "The Doctrine of the Thalweg as a rule of International Law". *A.J.I.L.*, vol 29 (1935), p. 309).

[136] See McDOUGAL, Myres S., and BURKE, William T. *The Public Order of the Oceans*, New Haven and London. Yale University Press, 1962; pp. 428/9, 724/5.

[137] See BOGGS, Whittemore S. "Delimitation of the Territorial Sea". *A.J.I.L.*, vol. 24 (1930), p. 541; "Delimitation of Seaward Areas under National Jurisdiction". *A.J.I.L.*, vol. 45 (1951), p. 240; "National Claims in Adjacent Seas", *Geographic Review.*, vol. 41 (1951), p. 185; ODA, Shigeru. "Boundary in the Continental Shelf". *Japanese Annual of International Law*. No. 12 (1968); pp. 264-284; PAWDA, D.J. "Submarine Boundaries". *I.&.C.L.Q.*, vol. 9 (1960), p. 628.

## A. *DELIMITATION OF INTERNATIONAL BOUNDARIES IN THE TERRITORIAL SEA.*

### i. *The Boundary Between Adjacent States*

In the Grisbadarna arbitration between Norway and Sweden[138], the panel of the Permanent Court of Arbitration was called upon to decide in a maritime boundary dispute. The Tribunal found that by the Peace Treaty of Roskilde, 1658, the maritime area in question was apportioned between the litigants and declared that in order to find what was the 17th century boundary line it had to have recourse to principles of law in force at that time[139].

Upon its conviction that in accordance with the fundamental principles of law, both ancient and modern, the maritime territory is an essential appurtenance of land territory[140], and declining to apply either the "median line" or the "thalweg" modes of delimitation as neither finds support in the law of nations in the 17th century[141], the Tribunal considered that:

> "we shall be acting more in accordance with the ideas of the Seventeenth Century and with the notions prevailing at that time if we admit that the automatic division of the territory in question must have taken place according to the general direction of land territory of which the maritime territory constituted an appurtenance, and if we consequently apply this same rule at the present time in order to arrive at a just and lawful determination of the boundary"[142].

In these circumstances the Tribunal ruled that:

> "the delimitation should be made today by tracing a line perpendicularly to the general direction of the coast, while taking into account the necessity of indicating the boundary in a clear and unmistakable manner, thus facilitating its observation by the interested parties as far as possible"[143].

The opinion has been expressed that the Tribunal has chosen the best and most conforming to modern international law method for delimitation of maritime international boundaries between adjacent states[144], and the

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[138] *U.N.R.I.A.A.*, vol. XI, p. 147; *A.J.I.L.*, vol. 4 (1910), p. 226.
[139] *A.J.I.L., ibid.*, p. 231.
[140] *Loc. cit.*
[141] *Ibid.*, p. 232.
[142] *Loc. cit.*
[143] *Loc. cit.*
[144] See STRUPP, K. "Der Streitfall Zwishen Scweden und Norwegen", München-Leipzig, 1914. *Die Gerchtichen Ertscheidungen*, Erster Teil, 1917, p. 47, at p. 140.

same solution had been advocated, at the time, by some leading authors[145], and also proposed by members of the I.L.C. in 1952[146]. But the technical solution adopted by the Tribunal as an interpretation of the law of the 17th century is not considered pertinent currently[147]. The Tribunal's exercise in intertemporal law has, thus, no direct application in this context nowadays.

The question of delimitation of lateral boundaries in the territorial sea was examined by the Committee of Experts of the League of Nations for the Progressive Codification of International Law[148].

The Rapporteur, M. Schüking, pointed out, on this occasion, two possible solutions. "The question" he said "is whether we should regard as the limit between the territorial seas an imaginary line constituting the prolongation of the land frontier between the two states in the same direction towards the sea or if a line should merely be drawn at 90° to constitute the frontier line between the two territorial seas at the point on the coast where the territories of the two states join"[149]. He was of the opinion, however, that no mandatory rule of delimitation should be elaborated, for:

> "It would be advisable to establish special rules in each case having regard to the special geographical circumstances which have led to the fixing of a new frontier. It would be better to arrange for the conclusion of a special agreement between the states concerned, or for the settlement of the matter by arbitration of an ordinary tribunal, than to lay down an immutable principle"[150].

Accordingly, no basis for discussion on this topic has been elaborated by the Preparatory Committee of the First Conference for the Codification of International Law[151].

Both of the possible solutions the Rapporteur considered were advocated by Lapradelle[152]. But as Boggs has shown[153] both methods are defective.

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[145] See, for example, ADAM I, Vittorio. *National Frontiers in Relation to International Law*. London, Oxford University Press, 1927, p. 50; GIDEL, Gilbert. *Le droit international public de la mer*. Paris, Etablissements Mellottée (Chatearoux), 1934, vol. III, pp. 768-770.

[146] See *Yb. Int. Law Comm.*, 1952, vol. I, p. 182 paragraph 13 and U.N. Doc. *A/CN. 4/SR. 172*, paragraph 61.

[147] See FRANCOIS, M.J.P.P. "La Cour Permanente d'Arbitrage, son origine, sa jurisprudence, son avenir". *R.d.C.*, 1955, vol. 1, p. 499.

[148] See Report to the Council of the League of Nations on the questions which appear ripe for international regulation. League of Nations publication. No. *C.196.M.70.* 1927. V.

[149] *Ibid.*, p. 42.

[150] *Loc. cit.*

[151] League of Nations publication. No. *C.74.M.39.* 1929. V.

[152] Lapradelle, *La Frontière*, pp. 215/6.

[153] BOGGS, *International Boundaries*, pp. 189-191.

None of the agreements concluded on the present issue between states has been thought to adopt solutions which could be generalized for useful application to other situations[154]. The solutions applied in practice were, in fact, far from being uniform[155].

It has been argued, therefore, by some members of the I.L.C., which dealt with the topic in its 171st meeting on July 24, 1952[156], that it would be impossible to frame a generally applicable rule on this matter. Alternatively, it has been suggested therein[157] that the experience establishes the desireability of permitting states to deviate, by agreement, from any general principle recommended in codification efforts, and that this was the meaning of article 13 of Professor François' First Report on the Territorial Sea to the Commission[158], which dealt with the topic.

Effectively, the Rapporteur seems to have had this consideration in mind when, upon the valuable advice of the eminent American specialist S. W. Boggs, he proposed the text of article 13[159] in the following terms:

> "The territorial sea of two adjacent states is normally delimited by a line every point of which is equidistant from the nearest point on the coastline of the two states".

The Rapporteur pointed out, in this connection, that the solution proposed would not be applicable if the special configuration of the coastline necessitated modifications and urged the Commission to consider that it was necessary to provide for cases of that kind.

The prescription recommended by Professor François seems to have been conceived mainly as a directive to parties concerned. In the discussion at the 171st meeting of the I.L.C. it was proposed, however, to formulate a two phase solution; first – the parties should delimit the boundaries by mutual agreement; second – failing agreement, the parties are under an obligation to have the boundaries fixed by arbitration[160].

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[154] McDOUGAL and BURKE, p. 430.

[155] See Regime of the Territorial Sea. Information and Observations submitted by Governments regarding the question of delimitation of the territorial sea of two adjacent states. U.N. Doc. *A/CN. 4/71.*

[156] *Yb. Int. Law Comm.*, 1952. vol. I, p. 181.

[157] *Ibid.*, paragraph 6.

[158] See U.N. Doc. *A/CN. 4/53*, (1952).

[159] *Loc. cit.*

[160] *Yb. Int. Law Comm., op. cit.*, p. 181, paragraph 12; see also *ibid.*, p. 183, paragraph 35.

It seems that the text finally adopted by the Commission[161] reflects the same approach, inasmuch as article 14 (I) of the 1951 report seems also to envisage a two-phase, complementary procedure, containing two directives; the first directed to the parties and the second to a third-party decision maker after failure of the prerequisite procedure[162].

But the article finally adopted does not contain any provision for compulsory arbitration[163]. It reads:

> "The boundary of the territorial sea between two adjacent states shall be determined by agreement between them. In the abssence of such agreement, and unless another boundary line is justified by special circumstances, the boundary is drawn by application of the principle of equidistance from the nearest point on the baseline from which the breadth of the territorial sea of each country is measured[164].

Under the most likely interpretation[165], the Commission intended the second sentence of this article, unfortunately without so indicating, to be a directive to a third-party decision-maker about the circumstances in which the principle of equidistance could appropriately be used.

The equidistance-special circumstances formula was, thus – and this being in variance with the corresponding draft articles in all previous reports[166] – not conceived as a directive to the parties, but only intended to facilitate the task of third-party decision-makers by providing an applicable basis for adjudication. Whereas these prescriptions do not provide for compulsory adjudication, the absolutely facultative nature of the delimitation operation is not transmuted, the parties being entirely free to use whichever method they prefer for delimitation and, in fact, not to delimit at all. In this respect, it is submitted, nothing essential was changed in comparison with the situation relating to land international boundaries.

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[161] See *G.A.O.R.*, 19th. Session, Supplement No. 9 *(Doc. A/3159)*, 1956, p. 18.

[162] See McDOUGAL and BURKE, *op. cit.*, pp. 431/2.

[163] And see *Yb. Int. Law Comm.*, 1952, vol. I, p. 183, paragraph 23.

[164] *Loc. cit.*

[165] See McDOUGAL and BURKE, 431/2.

[166] See, respectively, U.N. Doc. *A.CN.4/53*, Art. 13; *A/CN. 4/61/Add.I.* Art. 13 (2); *A/CN.4/77*, Art. 17; see especially commentary of the Committee of Experts on this topic (Report of the Committee of Experts on Technical questions concerning the Territorial Sea. U.N. Doc. *A/CN. 4/61/Add. I.*, pp. 6/7).

The difference, however, is noticeable when adjudication is contemplated, for, in contradistinction to the situation prevailing in relation to land boundaries[167], the article provides a substantial, mandatory rule of law as a basis for adjudication relating to maritime lateral boundaries. In adopting this rule the I.L.C. possibly paid special attention to the statement made by the British government on the question[168] to the effect that:

> "where two adjacent states are unable to reach agreement. . . and disputes arise, her Majesty's Government consider that as a rule recourse should be had to judicial settlement. Such settlement should be according to International Law rather than *ex aequo et bono*".

ii. *Boundaries between States on Opposite Coasts.*

In contradistinction to the situation in the foregoing instance of the lateral boundary between adjacent states there seems to have been one generally recommended method of delimitation of the territorial sea between opposing littoral states – the "median line" method.

Thus, the Institut de Droit International, in its Session at Paris on March 31, 1894 adopted a resolution on the regime and definition of the territorial sea[169]. Article 10 (I) reads:

> "les détrois dont les côtes appartiennent à des Etats différentes, font parties de la mer territoriale des Etats riverains, qui y exerceront leur souveraineté jusqu'a la ligne mediane"[170].

Article 9 of Project No. 10 on "National Domain" of the American Institute of International Law of October 1926[171] reads:

> "In straits and natural channels connecting two free seas and separating two or more republics – either on two continents, a continent and an island, or two islands – the limit of the territorial waters of each republic shall be the middle of the strait or channel separating them, if the width of this is less than – miles. In such cases each one of the said republics has within its own zone the right of sovereignty and jurisdiction which it possesses over its territorial sea"[172].

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[167] *Supra*, chapter three, section 2.

[168] See *A/CN. 4/71, op. cit.*, p. 15, at p. 16.

[169] See WEHBERG, Hans. *Institut de Droit International. Tableau général de resolutions. (1873-1956)*. Bâle, Editions juridiques et sociologiques S.A., 1957, p. 121.

[170] This applies only in relation to straits not wider than twice the width of the territorial sea preconized therein. *Ibid.*, p. 123.

[171] *A.J.I.L.*, vol. 20 (1926), Special Supplement No. 2, p. 318.

[172] *Ibid.*, p. 319; see also the same project as submitted to the International Commission of Jurists at Rio de Janeiro, April 1927 by the same institute (*A.J.I.L.*, vol. 23 (1929), Special Supplement No. 2, p. 370).

Likewise, Article 14 of the Draft Convention on the Law of Maritime Jurisdiction in time of Peace, elaborated by the International Law Association in 1926[173] reads:

> "In the case of straits and natural channels which connect two or more seas and which divide two or more states, the limit of the territorial jurisdiction of each state shall be the middle line of the strait or channel which divides them, when the strait or channel is six miles or less in width"[174]

In the draft prepared by the Japanese Association of International Law in conjunction with the Japanese branch of the International Law Association[175] we find the following prescription:

> "In the case of straits the coast of which belongs to two or more different states, the littoral waters follow the trend of the coast according to the general rule; but in case the distance between the two shores does not amount to six marine miles, the dividing line between tne respective littoral waters shall in principle be the middle line measured from the two coasts"[176].

The corresponding provision adopted by the Harvard Research[177] reads:

> "In the absence of special agreement to the contrary, where two or more states border upon a strait, the territorial waters of each state extend to the middle of the strait in these parts where the width does not exceeed six miles".

Whereas the unanimity of all these expert groups on the rule is evident, it should be noted that only in the last-cited project was the necessity to recognize the possibility of special agreements between states which would deviate from the general principle recommended therein expressly provided for.

The notion of the "middle line" was incorporated in the amended draft convention communicated to various governments by the League of Nations Committee of Experts for the Progressive Codification of International Law on January 29, 1926[178]. Article 6, paragraph two reads:

> "Straits not exceeding ten miles in width whose shores belong to different states shall form part of the territorial sea as far as the middle line".

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[173] *Ibid.*, p. 373.
[174] *Ibid.*, p. 375.
[175] *Ibid.*, p. 376.
[176] Article 3, paragraph two.
[177] *Ibid.*, p. 281, article 9.
[178] League of Nations Document *C.196.M.70.* 1927. V, p. 72.

The Committee thus adopted, *verbatim*, the draft proposed by Mr. Schüking, the Rapporteur, who considered extensively, for this purpose, the opinions expressed in the foregoing codification projects[179].

In their replies[180], governments have unanimously upheld the " middle line" method. Only in Sweden's reply, however, was provision expressly made to deviation possibilities. This reply reads:

> "In cases in which the territorial waters of two states meet in a strait, their boundary should, failing any provision to the contrary in a convention or in the absence of any other special reason, follow the median line"[181].

Indeed, this resembles closely the agreement/equidistance – special circumstances formula of which it was an early parent.

In the observations to the replies it was noted that "in narrow straits, the dividing line between the territorial waters is admitted to run down the centre of the strait" and this rule was proposed for discussion in the following terms:

> "When two states border on a strait which is not wider than twice the breadth of territorial waters, the territorial waters of each state extend in principle up to a line running down the centre of the strait"[182].

Although the method seemed unanimously admitted, it was not accepted in the 1930 Hague Conference. In fact, Subcommittee II of the Conference contented itself with the observation that:

> "it has been thought better not to draw up any rules regarding the drawing of the line of demarcation between the respective territorial seas and of width less than the breadth of two belts of Territorial sea"[183].

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[179] *Ibid.*, pp. 42/3.

[180] See League of Nations. Conference for the Codification of International Law. Vol. II, Territorial Waters. League of Nations Document *C.74.M.39.* 1929. V., pp. 55-59.

[181] *Ibid.*, p. 59.

[182] *Loc. cit.*

[183] See Conference for the Codification of International Law. Report of the Second Commission (Territorial Sea). League of Nations Document *C.230.M.117.* 1930. V., p. 14.

This was obviously so because no agreement could be reached thereby on the predominating question of the width of the territorial sea. Indeed, it was mainly because expert groups and governments believed that all states claimed, or ought to claim, a territorial sea of the same width and after having expressed a precisely defined opinion on this question that these organs could easily formulate a unanimously accepted method for delimitation of the horizontal maritime boundary between territorial seas.

It may safely be assumed that difficulties of the same nature explain the lack of provision relating to the matter in Professor François' First Report on the Regime of the Territorial Sea[184]. In the Second Report, however, we find the following text incorporated as Article 13 (i):

> "An international boundary between Countries the coasts of which are opposite each other at a distance of less than 2 T miles (T being the width of the Territorial sea) should as a general rule be the median line, every point of which is equidistant from the base-lines of the states concerned. Unless otherwise agreed between the adjacent states, all islands should be taken into consideration in drawing the median line. Likewise, drying rocks and shoals within T miles of only one state should be taken into account, but similar elevations of undetermined sovereignty, that are within T miles of both states, should be disregarded in laying down the median line. There may, however, be special reasons, such as navigation and fishing rights, which may divert the boundary line"[185].

In adopting this text the Rapporteur was obviously influenced by the report of the Committee of Experts on technical questions concerning the territorial sea[186] and therefore, it would appear, the "special circumstances" factor is so technically and meticulously elaborated. It is not sufficiently clear, however, from this text whether the words "as a general rule" occuring in the first sentence, imply possible deviations by agreement from the rule.

Indeed, the phrasing of article 16 of the Third Report on the Regime of the Territorial Sea[187] lends itself to a restrictive interpretation in this respect. Paragraph 2 of this article, in fact, shows that derogation possibilities were conceived only in relation to the "special circumstances" factor, restrictively and precisely defined therein (unlike in the foregoing 1953 text which contains the words "such as" in the last quoted sentence). It reads:

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[184] U.N. Doc. *A/CN. 4/53.*

[185] U.N. Doc. *A/CN. 4/61/Add. I*, p. 8.

[186] *Ibid.*, Annex I, at p. 6.

[187] U. N. Doc. *A/CN. 4/77*, p. 15.

"2. Exceptional considerations of navigation and fishing rights may justify a different delimitation of the boundary, in such a manner as the parties concerned may agree".

Otherwise, therefore, the rule is mandatory upon the parties. In framing this draft article the Rapporteur was picking up the solution proposed by Denmark[188] in combination with that prescribed in the report of the Committee of Experts[189].

At the 261st and 262nd meeting of the I.L.C. on July, 1954[190] doubts were expressed as to the exceptions to the median line rule as laid down in the above report[191]. It was also pointed out[192] that the question was one of *Lex Ferenda*, as international boundaries, whether on land, in rivers, or at sea could not be determined merely by the automatic application of a simple rule since several methods were used by states for that purpose in keeping with special needs. The imposition on states of a single system for delimiting their maritime boundaries was, therefore, opposed and it was urged that states should be left free to decide boundary questions in territorial waters by mutual agreement.

It was further pointed out, at the 262nd meeting[193], that serious difficulties might arise in the case of two states applying different rules with regard to the territorial sea, and that it was, therefore, premature to adopt the median line system before agreeing on the rule for delimitation of the territorial sea. Mr. Lauterpacht submitted that the whole draft was to be based on the assumption that there was a simple uniform distance for the breadth of the territorial sea and that otherwise the general rule should not be applied[194]. This interpretation was accepted by the majority of the members present[195].

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[188] U.N. Doc. *A/CN. 4/71, op. cit.*, p. 9.
[189] *Loc. cit.*
[190] *Yb. Int. Law Comm.*, 1954, pp. 100-103.
[191] *Ibid.*, p. 100, paragraphs 56, 57.
[192] *Ibid.*, paragraph 60 and p. 102, paragraph 16.
[193] *Ibid.*, p. 102.
[194] *Ibid.*, paragraph 6.
[195] *Ibid.*, paragraphs 9, 13, 14.

The chairman, therefore, gathered that the majority of the Commission wished the text of article I, paragraphs I and 2 to be simplified upon the foregoing considerations[196]. The Commission, thus, although approving of the Committee of Experts' proposals[197] and taking them as a basis for the relevant article, considered, however, that it would be wrong to go into much detail and that the rule should be fairly flexible. Consequently, it did not adopt certain points of detail laid down by the experts and, in particular, allowed much larger freedom of agreement to the parties concerned.

The 1955 draft of the Commission[198] contained an article(12) entitled "Delimitation of the Territorial Sea in Straits", and another (14) entitled "Delimitation of the Territorial Sea of Two States, the Coasts of which are Opposite each other". The method for delimitation in both cases was provided in article 14, which read:

> "I. The boundary of the Territorial sea between two states the coasts of which are opposite each other at a distance less than the extent of the belts of territorial sea adjacent to the two coasts in the absence of agreement between those states or unless another boundary line is justified by special circumstances, is the median line every point of which is equidistant from the nearest point on the base line from which the width of the territorial sea of each country is measured"[199].

In this text a clear distinction between the components of the agreement/equidistance – special circumstances formula is already provided.

Upon comments received from governments on these provisional articles[200], the Commission finally provided that the horizontal boundary should be fixed by agreement between the states which are at a distance less than the extent of the belts of territorial sea adjacent to the two coasts. "Failing such agreement and unless another boundary line is justified by special circumstances, the boundary is the median line every point of which is equidistant from the nearest points on the baselines from which the breadths of the territorial seas of the two states are measured"[201]. The interpretation of the Commission's foregoing provision on delimitation between adjacent states would apply, *mutatis mutandis*, in this case also.

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[196] *Ibid.*, paragraph 15.

[197] *Loc. cit.*

[198] See Report of the I.L.C. U.N. Doc. *A/2934.*

[199] *Ibid.*, p. 19.

[200] *Ibid.*, Annex, pp. 25-49; especially India's reply, p. 30; Norway's reply, p. 36; Sweden's reply, p. 39.

[201] Report of the I.L.C. covering the work of its 8th Session. U.N. Doc. *A/3159*, article 12, p. 17.

In addition, the Commission expressly provided that:

> "The rule established by the present article does not provide for any solution in cases in which the states opposite each other have adopted different breadths for their territorial seas. As long as no agreement is reached on the breadth of the territorial sea, disputes of this kind cannot be settled on the basis of legal rules; they must be settled by agreement between the parties"[202].

The evolution in the legislative history on this topic is noteworthy as it reveals a constant drift from rigid *de lege ferenda* formulas towards affirmation of the concept of complete freedom of the parties to choose whichever method they prefer for delimitation. This evolution is all the more remarkable considering the constantly unanimous approval of one method – the "middle line" system – in this context.

iii. *The United Nations Conference on the Law of the Sea, 1958, and the problem of Delimitation of International Boundaries in Territorial Waters.*

In the 1958 Conference on the Law of the Sea the problem of delimitation of international boundaries in the territorial sea was dominated by the differences over the permissible breadth of these waters. No wonder, therefore, that the most important efforts at amending the Commission's provisions were those to provide for instances in which different breadths were claimed for the territorial sea. As this problem does not arise in the context of lateral boundaries, however, it was a mistake to combine the Commission's provisions relating to the two situations, those of adjacent and opposing states; so doing, the Conference added unnecessary difficulties and placed the whole issue, in fact, under the sign of conflicting claims, seeking, therefore, remedies answering to attribution rather than to delimitation problems.

The underlying difficulties were pointed out, in fact, as early as August, 1957 by the Norwegian government[203]. "it is clear", submitted this comment, that:

> "if two states maintain different breadths, the rule will in some instances lead to an absurd result. Suppose two states, of which one claims six and the other three miles, oppose each other at a distance of eight miles. The proposed rule in that case would lead to the surprising result that one state will get more than it claims.

[202] *Ibid.*, p. 18, paragraph 7; but see comment of the government of Norway. U.N. Doc. *A/CONF. 13/5*, p. 63.

[203] *Loc. cit.*

And such cases could arise irrespective of whether or not agreement is reached on the maximum breadth of the territorial sea. Different breadths would still be possible, inasmuch as the actual delimitation of the territorial sea, within the maximum limits imposed by international law, must be left to the discretion of each individual state.

The foregoing should make it reasonably clear that it is impossible actually to determine the dividing line between the territorial seas of two opposing states by a rule of international law".

Norway, therefore, proposed a solution for the problem of conflicting claims in such cases by a provision to the effect that no state is entitled to extend the boundary of its territorial sea beyond the median line "or, to put it differently, that no state is entitled to include in its territorial sea waters which are closer to the baseline of another state than to its own"[204].

Accordingly, Norway proposed to the Conference's First Committee[205] to delete article 14 of the I.L.C.'s draft and replace the text proposed therein of article 12 by the following text:

"I. Where the coasts of two states are opposite or adjacent to each other, neither of the two states is entitled, failing agreement to the contrary between them, to extend its territorial sea beyond the median line whose demarcation is determined in such a way that every point of the line is equidistant from the nearest points on the baselines from which the breadths of the territorial seas of the two states are measured. This provision should not apply, however, where one of the states concerned through prescriptive usage has acquired the right to delimit its territorial sea in a way which is at variance with the provision.

2. If two states in delimiting the outer boundaries of their territorial seas enclose an area of the sea which would normally be part of the high seas, they may by bilateral agreement divide this area between them and thus give it the character of territorial sea provided that the breadth of the enclosed area at no point exceeds two miles."

This provision was appended with the intention to provide for "cases where two states opposite or adjacent to each other had adopted different breadths for their territorial seas"[206].

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[204] *Ibid.*, p. 64.

[205] U.N. Doc. *A/CONF. 13/L. 97.*

[206] See United Nations Conference on the Law of the Sea. Official Records. Vol. III, First Committee. U.N. Doc. *A/CONF.13/C. I/39.*, p. 187, paragraphs 14, 15, 16.

The solution proposed by Norway was finally adopted by the Conference, with regard to adjacent as well as opposing littoral states. The first sentence of article 12 of the Convention on the Territorial Sea and the Contiguous Zone, adopted by the United Nations Conference on the Law of the Sea on April 28, 1958[207] reads:

> "I. Where the coasts of two states are opposite or adjacent to each other, neither of the two states is entitled, failing agreement between them to the contrary, to extend its territorial sea beyond the median line every point of which is equidistant from the nearest points on the baselines from which the breadth of the territorial seas of the two states is measured".

It is abundantly clear, from the interpretation offered in the First Committee, that this provision was intended solely to overcome the problems mentioned in the above-quoted comment by Norway and not to establish a genuine rule to operate delimitation[208], and it is not the second sentence of the article, which provides for possible deviations[209] that defies this interpretation.

Nothing in the legislative history of article 12, in fact, contradicts the conclusion that the Conference contributed little, or nothing at all, to clarification and concretion of the law governing delimitation of maritime international boundaries between territorial seas. Indeed, the Conference, focusing its attention on the problem of apportionment of territorial waters, failed to establish any directly applicable imperative rule in this context[211]. It thus confirmed the evolution

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[207] U.N. Doc. *A/CONF. 13/L. 52.*

[208] *A/CONF. 13/39, op. cit.*, p. 190, paragraph 19; p. 192, paragraph 20: "The Norwegian proposal made it clear that a state was not obliged to extend the limit of its territorial sea to the median line if it did not wish to do so"; *ibid.*, paragraphs 29, 30, 34.

[209] *Op. cit.*, p. 5: "The provisions of this paragraph shall not apply, however, where it is necessary by reason of historic title or other special circumstances to delimit the territorial seas of the two states in a way which is at variance with this provision".

[210] In this connection it should be noted that the Norwegian proposal – the sponsors of which expressly stated that it was impossible to determine the dividing line between the territorial seas of two opposing states by a rule of international law (*op. cit.*) – was adopted by the conference at the expense of two proposals which were obviously advanced upon a diametrically opposed conviction. Namely, the proposal of Yugoslavia (U.N. Doc. *A/CONF. 13/C. I/L.60*) to delete the words "and unless another boundary line is justified by special circumstances" from paragraph I of articles 12 and 24 of the I.L.C.'s draft (*op. cit.*) and the proposal of Colombia (U.N. Doc. *A/CONF. 13/C. I/L. 120*) to replace article 12, paragraph I of the I.L.C. draft by the following text: "I. The boundary of the territorial sea between two states, the coasts of which are opposite each other at a distance less than the extent of the belts of territorial sea adjacent to the two coasts, shall be the median line every point of which is equidistant from the nearest points on the base lines from which the breadths of the territorial seas of the two states are measured. If the two states agree that another boundary line is justified by special circumstances, the boundary shall be fixed by agreement between these states" (and see U.N.Doc. *A/CONF.13/C.I./L.127* as to an equivalent Colombian proposal regarding adjacent states).

evolution formerly noticed, as it further drifted away from mandatory formulas[211]. Indeed, replacing the mandatory provisions of the I.L.C.'s proposal by a statement that the two states are not entitled to extend their territorial sea beyond the median line, the Conference enlarged considerably the margin of manoeuvre of affected states as far as delimitation is concerned[212].

iv. *Recent Trends in State Practice.*

The agreement between Norway and the U.S.S.R. concerning the maritime boundary in the Varangerfjord – which was signed at Oslo on February 15, 1957[213] and invoked in the discussions at the 1958 Conference's First Committee[214] – provided for a combined, complicated system for delimitation of the lateral boundary between the two states, a system adapted to the particularities of the case and hardly capable of generalization[215].

On march 18, 1958, the U.S.S.R. and Poland signed a boundary protocol at Warsaw[216]. In this instrument the perpendicular line method of delimitation was utilized to describe the respective maritime boundary[217].

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[211] Thus, the mandatory phrase "shall be fixed by agreement" occuring in the first sentence of the I.L.C. draft was replaced by the words "failing agreement" (and see *A/CONF. 13/39, op. cit.*, p. 188, paragraph 16).

[212] For example, article I, paragraph two of the agreement concluded between Norway and the U.S.S.R. on February 15, 1957 concerning their respective sea boundary in the Varangerfjord (U.N.T.S., no. 4523, vol. 312 (1958), p. 289) reads:

> "Neither of the contracting parties shall extend its territorial sea beyond the straight line extending from the intersection referred to in the first paragraph of this article to the median point of the line between cape Nemetsky and Cape Kibergnes".

This is an example of bilateral agreement on the line of article 12 of the Geneva Convention.

Another example, also perfectly in line with the same provision, although of a unilateral character: *note verbal* of 20 May, 1967 from the Moroccan Ministry of Foreign Affairs to the Danish Embassy in Rabat "... .sur les côtes de notre Royaume baignées par le détroit de Gibraltar, les eaux territoriales marocaines s'étendent du point de vue de la pêche, à 6 milles marines comptés de la laisse de basse mer, sans toutfois que cette limite s'étende au-delà de la ligne médiane du détroit de Gibraltar dont tous les points sont équidistants des points les plus proches des côtes espagnoles et marocaines". *I.C.J. Reports*, 1969, *Pleadings*, vol. I, p. 269.

[213] *Loc. cit.*

[214] *Op. cit.*

[215] Article I reads:

> "The Sea Frontier between Norway and the Union of Soviet Socialist Republics in the Varangerfjord shall follow a straight line from . . .the terminal point of the frontier drawn in 1947, to the intersection of the outer limit of Norwegian and Soviet Territorial waters. . ."

*Op. cit.*, p. 322; and see apended map between pp. 392 and 393.

[216] Protocol between the Government of the Polish Peoples Republic and the Government of the Union of Soviet Socialist Republics concerning the delimitation of Polish and Soviet territorial waters in the Gulf of Gdansk and the Baltic Sea. *U.N.T.S.*, no. 4861, vol, 340, p. 89.

[217] Article I:

> "The boundary separating the territorial waters of the Polish People's Republic and the Union

Seven years later, on May 20, 1965 the U.S.S.R. concluded a maritime delimitation treaty with Finland[218]. Although it was specifically pointed out therein[219] that regard was had to the Geneva Convention of 1958, the method chosen for delimitation again responded to the particular needs of the case and is not corresponding to any generalized rule[220].

On October 24, 1968 Saudi Arabia and Iran signed an agreement concerning sovereignty over the Al-Arabiyah and Farsi islands and delimitation of the boundary line separating the submarine areas between the two states[221]. Article I of this agreement reads:

> "the parties mutually recognize the sovereignty of Saudi Arabia over the islands of Al-Arabiyah and of Iran over the islands of Farsi. Each island shall possess a belt of territorial sea twelve nautical miles in width, measured from the line of the lowest low water on each of the said islands. In the area where these belts overlap, a boundary line separating the territorial seas of the two islands shall be drawn so as to be equidistant throughout its length from the lowest low water lines on each island".

This is the only recent clear application of the equidistance method as defined in the 1958 Geneva Convention on the territorial sea.

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of Soviet Socialist Republics shall follow a line perpendicular to the shoreline at the terminal point of the Polish-Soviet state frontier on the Baltiiskaya (Mierzeja Wilslana) and running to the point of intersection with the outer limit of the territorial waters of the Polish People's Republic. An extension of this line in the same direction to the point of intersection with the outer limit of the territorial waters of the Union of Soviet Socialist Republics shall constitute the boundary of the territorial waters of the Soviet Union".
*Ibid.*, p. 94.

[218] Finland-U.S.S.R. Agreement concerning the boundaries of the Sea areas and of the Continental Shelf in the Gulf of Finland. Signed at Helsinki on 20 May 1965. *U.N.T.S.*, no. 8238, vol. 566, p. 31.

[219] *Ibid.*, p. 38.

[220] Article I reads:

"The contracting parties agreed that the sea frontier between Finland and the U.S.S.R. and the boundaries of Finish and Soviet territorial waters in the section of the Gulf of Finland to the north-east of the island of Suursaani (Gogland) shall be drawn as follows:
The sea frontier . . . shall follow a straight line in the south-westerly direction from the territorial point of the sea frontier fixed in 1940 and confirmed by the 1947 treaty of peace with Finland. . . to the point . . . and then turn and follow a straight line in a west-south-westerly direction to the point. . . which shall be the terminal point of the sea frontier between Finland and the Soviet Union".

*Loc. cit.* and see map appended to the 1947 peace treaty with Finland *U.N.T.S.* (no. 746), p. 48, insert between pp. 304 and 305 therein.

[221] *International Legal Materials*, vol 8 (1969), p. 493.

Apart from these treaties concluded by the Soviet Union and by Saudi Arabia no other registered delimitation treaties relating to maritime boundaries between territorial waters were concluded recently. It is obvious, therefore, that there was no consolidation of any rule governing delimitation whatsoever, whether on lines proposed by the I.L.C. or otherwise. Indeed, the situation in this respect greaty resembles that existing in relation to land international boundaries.

## B. *DELIMITATION OF INTERNATIONAL BOUNDARIES IN THE CONTINENTAL SHELF.*

### i. *Article 6 of the Convention on the Continental Shelf, 1958.*

The importance of delimiting international boundaries in the continental shelf was stressed by the I.L.C. as early as 1950. Thus, we read in the Commission's report of this year[222] that:

> "The Commission agreed that, where two or more neighbouring states were interested in the sub-marine area of the continental shelf outside their territorial waters, boundaries should be delimited. It should not be possible for states to penetrate into the region attributable to another state for purposes of control and jurisdiction"[223].

Likewise, the International Law Association's Committee on "rights of the seabed and its subsoil" in its report in the same year stated that, when continental shelves overlapped, criteria for their delimitation should be studied[224].

Consequently, in his second report on the High Seas[225] of April 1951 Professor François, the Rapporteur of the I.L.C., proposed that:

> "If two or more states are interested in the same continental shelf outisde their territorial waters, the limits of the part of the shelf belonging to each should be fixed by agreement between them. In the absence of agreement the demarcation between the continental shelves of two neighbouring states should be constituted by the prolongation of the line separating the territorial waters, and the demarcation between the continental shelves of the two states separated by the sea should be constituted by the median line between the two coasts"[226].

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[222] Report of the I.L.C. covering its Second Session. *G.A.O.R.*, 5th. Session, Supplement No. 12 (*A/1316*).

[223] *Ibid.*, p. 22, paragraph 22; and see *Yb. Int. Law Comm*, 1950, pp. 232-234.

[224] See International Law Association. *Report of the 44th. Conference.* Copenhagen, 1950, pp. 125, 135.

[225] U.N. Doc. *A/CN. 4/42.*

[226] *Ibid.*, p. 70, paragraph 9.

In the discussion at the Commission's 115th meeting, on July 2, 1951[227] the inherent weakness of the proposed methods was demonstrated[228], and it was generally agreed that it was impossible, for the time being, to find a generally applicable method of delimitation[229]. But it was generally accepted by the members present that the Commission should lay down the essential rule that it was the duty of states to reach agreement between themselves on the question[230].

Upon these underlying considerations the Commission, at its 3rd Session held in 1951 adopted, as article 7 of its draft articles on the continental shelf[231], a double phase, mandatory procedure for settlement of the problem in the following terms:

> "Two or more states to whose territories the same continental shelf is contiguous should establish boundaries in the area of their continental shelf by agreement. Failing agreement, the parties are under the obligation to have the boundaries fixed by arbitration"[232].

Having regard to the preparatory work preceding the drafting of this provision and to the comment appended thereby[233], it would seem that the first sentence of this article constitutes, in essence, a sort of *pactum de contrahendo*; that is, it constitutes an obligation upon parties to engage in meaningful negotiation. If agreement cannot thus be reached "the interested states should be under an obligation to submit the question to arbitration *ex aequo et bono*. The term 'arbitration' is used in the widest sense, and includes possible recourse to the International Court of Justice"[234].

In their comments on these draft articles[235], governments which commented on article 7 generally pointed out to the necessity to formulate some directives or guiding principles for delimitation, especially as a basis for arbi-

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[227] *Yb. Int. Law Comm.*, 1951, vol. I, p. 286.

[228] *Ibid.*, p. 286, paragraph 118-120.

[229] *Ibid.*, p. 287.

[230] *Ibid.*, p. 286, paragraph 114; p. 287, paragraphs 123, 124.

[231] U.N. Doc. *A/CN. 4/49*.

[232] *Ibid.*, p. 3.

[233] *Loc. cit.*

[234] *Loc. cit.*

[235] See report of the I.L.C. covering the work of its 5th Session. *G.A.O.R.*, 8th Session, Supplement No. 9 (*A/2456*), Annex II.

tration and for possible recourse to the I.C.J[236]. Some governments objected to compulsory arbitration in the way prescribed in the draft[237]. One government expressed the opinion, in relation to the first sentence of the article, that:

> "It is not a correct manner of approaching the problem of codification or progressive development of international law to include in the draft articles under discussion a *pactum de contrahendo* couched in such general terms, the legal value of which is questionable"[238].

Upon consideration of these comments, received from the governments of eighteen countries, the Rapporteur, in his 4th report on the regime of the High Seas[239], pointed out to the absence of rules of positive law[240]. He proposed, therefore, in view of the objections raised by several states against arbitration *ex aequo et bono*, that the words "to have the boundaries fixed by arbitration" should be replaced by the words "to submit the dispute to conciliation procedure". The Rapporteur thus dropped the compulsory arbitration clause[241]. He thereupon expressed his belief, however, that the Commission should endeavour to draw up general rules for the delimitation of the continental shelf as soon as it considers this task could be undertaken with reasonable prospects of success[242]. It should be noted that the phrasing of the first sentence was left unchanged albeit the misgiving expressed in relation to its *pactum de contrahendo* character. Indeed, no remarks were made by the Rapporteur on Israel's comment in this context.

In view of the conclusions reached by the Committee of Experts on certain technical questions concerning the territorial sea[243], the Rapporteur, in June, 1953, proposed an amended text for article 7 to replace the one contained in his 4th report. The new text ran as follows:

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[236] See Belgium's reply, *ibid.*, p. 42; Denmark's reply, *ibid.*, p. 47; Egypt's reply, *ibid.*, p. 51 (paragraph 4); Israel's reply, *ibid.*, p. 60 (paragraph 8); the reply of the Netherlands, *ibid.*, p. 62; the United Kingdom's reply, *ibid.*, p. 69; Yugoslavia's reply, *ibid.*, p. 71.

[237] Denmark's reply, *loc. cit.*; Israel's reply, *loc. cit.*; reply of the United States, *ibid.*, p. 70.

[238] Israel's reply, *loc. cit.*

[239] U.N. Doc. *A/CN. 4/60.*

[240] *Ibid.*, p. 113.

[241] See draft article 7 and appended comment in *ibid.*, p. 129.

[242] *Ibid.*, p. 114.

[243] *Op. cit.*

"I. Where the same continental shelf is contiguous to the territories of two or more States whose coasts are opposite to each other, the boundary of the continental shelf appertaining to each State should be the median line, every point of which is equidistant from the two opposite coasts.

2. Where the same continental shelf is contiguous to the territories of two adjacent States, the boundary of the continental shelf appertaining to each State should be drawn according to the principle of equidistance from the respective coastlines of the adjacent States.

3. If the parties cannot agree on how the lines are to be drawn in accordance with the principles set forth in the preceding paragraphs, the dispute shall be submitted to arbitration"[244].

That this mandatory formula was propped by the Committe of Experts' recommendations is clear from the appended comment[245]. In view of the comment appended to the preceding draft article it is evident that the compulsory arbitration clause reappeared in this latter draft only because an imperative rule was included therein, directed to the parties as well as to the Tribunal.

In the discussion at the Commission's 201st meeting[246], it was argued that the system laid in the foregoing draft should not be mandatory in the presence of existing or future bilateral agreements[247]. Consequently, at the Comission's 204th meeting, on June 29, 1953[248], an amendment to this draft was proposed to the effect of providing for possibilities of deviation by agreement from the general rule[249]. No opposition was expressed to this amendment as far as deviation by agreement is concerned, and, indeed, the Rapporteur explained that this possibility was implied in his latest draft[250]. He pointed out, however, that the third paragraph was no longer necessary, since th Commission had adopted an additional article wherein provision was made for sub-

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[244] *Yb. Int. Law Comm.*, 1953, vol. I, p. 106.

[245] *Loc. cit.*

[246] *Loc. cit.*

[247] *Ibid.*, p. 107, paragraph 43.

[248] *Yb. Int. Law Comm.* 1953, vol. I, p. 125.

[249] The text of the proposal reads:

"I. Where the same continental shelf is contiguous to the territory of two or more States whose coasts are opposite each other, the boundary of the continental shelf appertaining to them shall, unless otherwise amicably determined by them, be the median line every point of which is equidistant from the outer limits of their respective territorial seas.

2. Where the same continental shelf is contiguous to the territories of two adjacent States, the boundary of the continental shelf appertaining to them shall, unless otherwise amicably fixed by them, be determined by the principle of equidistance from the outer lines of their respective territorial seas.

3. Any dispute concerning the determination and location of boundary lines shall be submitted to arbitration". *Loc. cit.*

[250] *Ibid.*, p. 125, paragraph 5.

mission of all disputes to arbitration[251]. It was further claimed in the ensuing discussion that it was necessary to provide for exceptions to the general rule[252].

In these circumstances Pr. François proposed a text providing that:

> "the boundary of the continental shelf appertaining to each State shall, as a general rule, and unless otherwise agreed by them, be the median line"[253].

An objection was raised concerning the words "as a general rule", to the effect that these should be omitted unless the commentary was to contain a full explanation of them, giving specific instances of cases where a departure from the rule was permissible[254]. But the Rapporteur explained that the purpose of inserting an escape clause was to enable arbitrators to deviate from the rule in special circumstances[255]. The suggestion that the words "as a general rule" be replaced by the words "unless another boundary line is justified by special circumstances"[256] was, therefore, upheld expressly upon this underlying consideration[257]. The interpretation of the draft article as amended thereabout by the Commission[258] should be undertaken in view of this background.

The final draft adopted by the I.L.C.[259] in 1956 as article 72, sought to emphasise that agreement ought to be the primary way of disposing of the issue. It reads:

> "Where the same continental shelf is adjacent to the territories of two or more States whose coasts are opposite to each other, the boundary of the continental shelf appertaining to such States shall be determined by agreement between them. In the absence of agreement, and unless another boundary line is justified by special circumstances, the boundary is the madian line, every point of which is equidistant from the baselines from which the breadth of the territorial sea of each country is measured.

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[251] *Ibid.*, paragraph 6.

[252] *Ibid.*, paragraph 14, p. 126; p. 128. paragraphs 37-38.

[253] *Ibid.*, p. 128, paragraph 40 and 129, paragraph 56.

[254] *Ibid.*, p. 128, paragraph 47; p. 129, paragraph 6.

[255] *Ibid.*, p. 131, paragraph 14.

[256] *Ibid.*, p. 130, paragraph 62.

[257] *Ibid.*, paragraph 16, p. 131; p. 132, paragraph 21. *Ibid.*, paragraph 29: "After all, the Commission had accepted the principle of arbitration and must therefore leave it to the arbitrators to assess the special circumstances"; *ibid*, p. 133, paragraphs 33-34, 35; "The arbitral Tribunal would have to pronounce on the existence or on the non-existence of such special circumstances. If it made no pronouncement than the rule would have to be applied"; paragraph 39. *ibid.*, p. 134.

[258] See text in *G.A.O.R.*, 8th. Session, Supplement No. 9 (*A/2456*)

[259] *A/3159, op. cit.*, p. 44.

2. Where the same continental shelf is adjacent to the territories of two adjacent States, the boundary of the continental shelf shall be determined by agreement between them. In the absence of agreement, and unless another boundary line is justified by special circumstances, the boundary shall be determined by application of the principle of equidistance from the baselines from which the breadth of the territorial sea of each of the two countries is measured".

With regard to its legislative history, the most pragmatical interpretation of this text would seem to the present author to be the following. The first sentence in both paragraphs (relating to opposing and to adjacent States) is a directive to affected states. Formulated as an imperative ("shall be determined") it is, in essence, a *pactum de contrahendo* clause; otherwise, the second sentence would be superfluous.

The second sentence is a directive to a third-party decision-maker to apply the equidistance method of delimitation unless another alignment is justified by special circumstances[260]. This second-best procedure shall be resorted to "in the absence of agreement"; that is, in view of the mandatory phrasing of the first sentence, after the failure of negotiations.

In the case of failure of negotiations for delimitation and no submission to third-party procedure for settlement, no boundary will exist between the respective continental shelves. This last possibility is apparently avoided in the interpretation offered by McDougal and Burke[261], according to which the equidistance (or median line) rule will apply in such cases. This interpretation could be sustained in view of the Commission's provision for compulsory adjudication[262].

The 1958 conference of the law of the sea, however, while adopting almost *verbatim* the Commission's draft article 72 as article 6 of the Convention on the Continental Shelf[263], failed to provide for compulsory arbitration or adjudication. In these circumstances it is evident that one State involved could frustrate the application of the rule, by referring to the special circumstances escape clause. In the absence of agreement to submit the case to decision by a third party, the rule will not be applicable. The

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[260] In the commentary appended the Commission explained that:
"as in the case of the boundaries of the territorial sea, provision must be made for departures necessitated by any exceptional configuration of the coast, as well as the presence of Islands or of navigable channels. This case may arise fairly often, so that the rule adopted is fairly elastic". *Loc. cit.*

[261] *Op. cit.*, pp. 727/8

[262] *Op. cit.*, article 73.

[263] U.N. Doc. *A/CONF. 13/L. 55.*

interpretation submitted above would, therefore, seem much more conforming with the realities of the case. As McDougal and Burke acknowledge:

> "In the absence of an obligation to arbitrate a state may insist that special circumstances require a boundary line different from the median line or based on the principle of equidistance. The only resolution possible in such circumstances is to negotiate or to submit to arbitration, methods which themselves presuppose agreement"[264].

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Before turning to examine state practice, a perusal of the Conference's work concerning the "special circumstances" component of the formula of Article 6 is requisite.

At the 1958 Conference's 4th Committee, Yugoslavia proposed to delete this provision altogether[265].

The United Kingdom proposed, in the same forum, to delete the text of Article 73 and substitute a text which does not refer to "special circumstances" and, thus, constitutes a directive to the parties, exclusively. These were to delimit continental shelf areas by agreement. In the absence of agreement it was therein proposed that the equidistance method would apply automatically[266].

On the other hand, it was proposed by Italy[267] and by Iran[268] to provide some concrete precisions to the "special circumstances" escape provision.

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[264] *Op. cit.*, p. 729.

[265] See U.N. Doc. *A/CONF. 13/C. 4/L. 16.*

[266] See *A/CONF. 13/C. 4/L. 24, ibid.*, p. 2. The proposed text reads:

"1. Where the submarine areas referred to in Article 67 are adjacent to the territory of two or more States whose coasts are opposite each other, the boundary of such areas appertaining to such States shall, in the absence of agreement on any other boundary, be the median line every point of which is equidistant from the nearest points in the base lines from which the breadth of the territorial sea is measured".

Paragraph 2, relating to adjacent States is similarly formulated. And see also *ibid., A/CONF.13/C.4/L.28.*

[267] *Ibid; A/CONF.13/C.4/L.25 Rev. I.*

[268] *Ibid., A/CONF.13/C.4/L.60.*

The Fourth Committee considered these proposals during its 31st to 33rd meetings. But did not change the I.L.C.'s draft in this respect when it adopted the amended draft of article 72 on April 9, 1968[269], neither did the drafting group change it[270]. This text was adopted *verbatim* as article 6 of the Continental Shelf Convention[271]. It seems, thus, that the conference, refraining from precisions regarding "special circumstances" (beside those provided in the I.L.C.'s commentary to its final draft[272]) wished to leave the appreciation of this factor in concrete situations to the third party decision-maker to whose attention the second sentence of both substantive paragraphs of article 6 was apparently directed[273].

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[269] *Ibid., A/CONF 13/C.4/L.64.*

[270] See *ibid., Annex to A/CONF.13/C.4/L.65.*

[271] *Op. cit.*

[272] *Op. cit.*

[273] Some declarations on or reservations to this provision were made on this background. See U.N. Doc. *ST/LEG/SER.D/4.*, Multilateral Treaties in respect of which the Secretary General performs Depository Functions – List of Signatures, Ratifications, Accessions, etc., as at 31 December, 1970.

Thus Iran, at its signing of the Convention, submitted the following declaration:

> "With respect of the phrase 'and unless another boundary line is justified by special circumstances' included in paragraphs 1 and 2 of this article, the Iranian Government accepts this phrase on the understanding that one method of determining the boundary line in special circumstances would be that of measurement from the high water mark".

Venezuela (at the signature of the Convention) declared that:

> "There are special circumstances to be taken into consideration in the following areas: the Gulf of Paria, in so far as the boundary is not determined by existing agreement, and in zones adjacent thereto: the area between the coast of Venezuela and the island of Aruba; and the Gulf of Venezuela".

France (at its accession to the Convention) made the following reservation (which the United States, Yugoslavia and the United Kingdom declared as unacceptable in their letters of September 9, 1965, September 29, 1965 and January 14, 1966 respectively).

> "In the absence of a special agreement, the Government of the French Republic will not accept that any boundary of the continental shelf determined by application of the principle of equidistance shall be invoked against it
> if such boundary is calculated from baselines established after 29 April 1958;
> if it extends beyond the 200 metre isobat;
> if it lies in areas where, in the Government's opinion, there are 'special circumstances" within the meaning of article 6, paragraphs 1 and 2, that is to say: The Bay of Granville, and the sea areas of the straits of Dover and of the North Sea off the French coast".

Yugoslavia (at the ratification of the Convention) stated that it "recognized no 'special circumstances' which should influence that delimitation".

China stated that it considers:

> "(I) That the boundary of the continental shelf appertaining to two or more States who's

ii. *Trends in State Practice*

The delimitation of the Gulf of Paria between Venezuela and Trinidad, agreed upon by the governments concerned in 1942[274], was not a delimitation of international boundaries; it related, rather, to partition of the continental shelf under the waters of the Gulf[275].

Whereas Saudi Arabia and Bahrain had, on the eve of the first Geneva conference, made an effort to establish a boundary approximating a median line drawn in accordance with the equidistance method[276], a different solution was adopted by Saudi Arabia in its relations with another neighbour state, Kuwait[277]. This latter agreement, in fact, refraining from dividing the disputed offshore area in the Gulf by an equidistance line or any other geometrical construction, plumped for economical rather then political division of the oil-rich submarine area.

On October 24, 1968, Saudi Arabia and Iran signed an agreement at Teheran[278] in which the equidistance method was apparently used for delimitation of the respective "submarine areas".

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coasts are adjacent to and/or opposite each other shall be determined in accordance with the principle of the natural prolongation of their territories. . ."

[274] See Treaty between His Majesty in respect of the United Kingdom and the President of the United States of Venezuela relating to the Submarine areas of the Gulf of Paria. Signed at Caracas, February 26, 1942. *L.N.T.S.* (No. 4829), vol. 205, p. 121.

[275] Article 2 reads:

"(I) His Majesty the King declares that he for his part will not assert any claim of sovereignty or control over those parts of the submarine areas of the Gulf of Paria which lie westerly of the line A-B, or southerly of the lines. . . described in Article 3 of the present Treaty, and that he will recognize any rights of sovereignty or control which have been or may hereafter be lawfully acquired by the United States of Venezuela over the said parts of the submarine areas of the Gulf of Paria.

(2) The President of the United States of Venezuela declares that he for his part will not assert any claim to sovereignty or control over those parts of the submarine areas of the Gulf of Paria which lie easterly of the line A-B or northerly of the lines. . . described in Article 3 of the present Treaty, and which have been or may hereafter be lawfully acquired by His Majesty the King over the said parts of the submarine areas of the Gulf of Paria". *Ibid.*, p. 122.

[276] See Agreement between the Kingdom of Saudi Arabia and the Government of Baharain. February 22, 1958. *I.&C.L.Q.*, vol. 7 (1958), p. 519.

[277] Agreement between the State of Kuwait and the Kingdom of Saudi Arabia relating to the Neutral Zone. July 7, 1965. *A.J.I.L.*, vol. 60 (1966), p. 744; article VIII, paragraph two:

"The two contracting parties shall exercise their equal rights in the submerged area beyond the aforesaid six mile limit mentioned in the previous article by means of joint exploitation, unless the two parties agree otherwise". *Ibid.*, p. 746.

[278] *International Legal Materials*, vol. 7 (1968), p. 493.

A communiqué published on January 13, 1968, in Teheran, announced the conclusion of an agreement between Iran and Kuwait on the delimitation of research zones in the Persian Gulf[279].

On January 8, 1968, Italy and Yugoslavia signed an agreement on delimitation of the continental shelf[280], applying a method resulting in an alignment slightly differing from the equidistance line as prescribed in the 1958 Geneva Convention (see appended chart therein).

The Soviet Union and Finland delimited their respective continental shelves in the Gulf of Finland by an agreement of May 20, 1965[281]. In articles 2 and 3 the contracting parties agreed not to broaden their fishing and other zones, as well as their territorial waters, beyond median lines defined therein. Article 6 provides that:

> "The lines specified in Article 2 and 3 of the present agreement shall be the boundaries of the continental shelf of the Republic of Finland and the Union of Soviet Socialist Republics in the Gulf of Finland"[282].

This agreement, as was mentioned above, specifically refers to the 1958 Geneva Conventions.

Likewise, in the agreement signed at Helsinki on May 5, 1957, between Finland and the U.S.S.R., concerning delimitation of the continental shelf in the north-eastern part of the Baltic Sea[283], the parties – "bearing in mind the Geneva Convention of 1958 on the continental shelf" – agreed to define as their horizontal shelf boundary "the median line"[284].

On October 23, 1968, the D.D.R., Poland and the Soviet Union signed, at Moscow, a declaration on the continental shelf of the Baltic Sea[285]. This stated (article 2) that:

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[279] *Le Figaro*, Paris, January 15, 1968.
[280] *International Legal Materials*, vol. 7 (1968), p. 547.
[281] *International Legal Materials*, vol. 6 (1967), p. 727.
[282] *Ibid.*, p. 728.
[283] *U.N.T.S.* (No. 9157), vol. 640, p. 111; *International Legal Materials*, vol. 7 (1968), p. 560.
[284] Article I:
"The contracting parties agree that the boundary of the continental shelf between the Republic of Finland and the Union of Soviet Socialist Republics in the north-easterly part of the Baltic Sea in the section extending to the west of the line . . . and up to the line . . . shall be the median line". *Ibid.*, p. 117.
[285] *International Legal Materials*, vol. 7 (1968), p. 1393.

"In accordance with the provisions of the 1958 Geneva Convention on the Continental Shelf, the surface and subsoil of the bed of the Baltic sea as a shallow sea are a continuous continental shelf, which is subject to delimitation among the respective baltic states"

and that (article 4):

"Delimitation of the continental shelf of the Baltic Sea must be carried out in conformity with the principles set forth in the 1958 Geneva Convention on the Continental Shelf and, in particular, in Article 6 of the said Convention".

Article 6 therein implied that final delimitation will be determined "by the conclusion of bilateral or multilateral agreements between the States concerned"[286].

A further series of shelf delimitations has been agreed on in the North Sea area[287] between states bordering it: Great-Britain, the Netherlands, the German Federal Republic, Denmark and Norway. Of these delimitations, those between Great Britain, on the one hand, and Norway, Denmark and the Netherlands, on the other, were of "horizontal" boundaries between opposing states. These three delimitations were based on the concept of the "median line".

Under the agreement between Great Britain and Norway of March 10, 1965[288], the dividing line between the respective continental shelves:

"Shall be based, with certain minor divergencies for administrative convenience, on a line, every point of which is equidistant from the nearest points on the baselines from which the territorial sea of each country is measured"[289].

Likewise, the agreement of October 6, 1965, between the United Kingdom and the Netherlands[290] states, in its preamble, the parties' desire to establish a boundary between their respective parts of the continental shelf under the North Sea:

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[286] *Ibid.*, p. 1394.

[287] In this area, of about 575000 square miles, which is a shallow sea except in the submarine trench off the coast of Norway, recent discovery of natural gas deposits gave rise to great concern for the surrounding countries; See *I.C.J. Reports*, 1969, p. 14.

[288] See *U.N.T.S.* (No. 8043), vol. 551, p. 213.

[289] Article I. *Ibid.*, p. 214; in fact, a line to link eight point defined by latitude and longtitude is described (article 2).

In the South the termination point of the boundary is the point of intersection of the dividing lines between the continental shelves of the United Kingdom, Norway and Denmark. The position of this nodal point is to be subject to acceptance by Denmark (article 3). *Ibid.*, p. 216.

[290] See *U.N.T.S.* (no. 8616), vol. 595, p. 113.

"on the basis of a line every point of which is equidistant from the nearest points on the baselines from which the territorial sea of each country is at present measured"[291]

The agreement of March 3, 1966 between the United Kingdom and Denmark[292] stipulates that:

"The dividing line between that part of the continental shelf which appertains to the United Kingdom. . . and that part that appertains to the Kingdom of Denmark is in principle a line which at every point is equidistant from the nearest points of the baselines from which the territorial sea of each country is measured"[293].

The other delimitations operated in the North Sea continental shelf (Norway-Denmark, Denmark-West Germany and West Germany-The Netherlands) concern lateral boundaries.

Article I of the agreement between Norway and Denmark of December 8, 1965[294] stipulates that the boundary between these states' respective continental shelves:

"shall be the median line to be determined so that every point of that line is equidistant from the nearest points of the baselines from which the breadth of the outer territorial waters of the contracting states is measured"[295].

The preamble of the agreement concluded on March 31, 1966 between the Netherlands and Denmark[296] recites the desire of the parties to:

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[291] *Ibid.*, p. 115; a line to link the points defined by latitude and longtitude is described in article I.
In the North the termination point of the boundary in fact coincides with the termination point of the boundary between the United Kingdom and Denmark as defined in the agreement of March 3, 1968 (*infra.*). In the South the termination point is the point of intersection of the dividing lines between the continental shelves of the United Kingdom, the Netherlands and Belgium (article 2). *Ibid.*, p. 117.

[292] *U.N.T.S.* (No. 8574), vol. 592, p. 207.

[293] Article I, *Ibid.*, p. 309; article 2 indicates the line to link two points defined by latitude and longtitude "in implementation of the principle set forth in article I".
In the North the termination point of the boundary is the point of intersection between the dividing lines of the respective continental shelves of the United Kingdom, Denmark and Norway. In the South the termination point is indicated in the agreement between the United Kingdom and the Netherlands (article 3. *Ibid.*, p. 211).

[294] *U.N.T.S.*, vol. 634 (1968), p. 7.

[295] *Ibid.*, p. 8; straight lines were to link eight points defined in article 2.
The termination points are the points at which the boundary line meets the boundary of the continental shelves of other states. These points are to be established definitively after consultation with the third states concerned (article 3).

[296] *U.N.T.S.* (No. 8751), vol. 604 (1967), p. 209.

"fix the boundary between their respective portions of the continental shelf under the North Sea on the basis of a line which at every point is situated at an equal distance from the nearest points on the base lines from which the outer territorial waters of each country are measured at the present time"[297].

Article I defines the alignment geometrically "in. . . application of the median-line principle set out in the preamble of this agreement"[298].

The latter treaty was only concluded after prolonged negotiations between West Germany and its neighbours failed to reach more than partial results. The Federal Republic, however, has never acquiesced in the alignment drawn by her neighbours off her own coastal areas. Pinched by Denmark and the Netherlands on her two sides, Germany claimed an "equitable apportionment" of the area and on this background the problem was later submitted to the International Court of Justice as "The Continental Shelf Cases".

On December I, 1964, the Federal Republic and the Netherlands —in keeping with the joint settlement arrived at in the Supplementary Agreement of May 14, 1962[299] to the Ems-Dollard Treaty of April 8, 1960[300] for the determination of a gas exploitation frontier in the estuary of the river Ems from Emden to the outer limit of the respective territorial seas — limited the delimitation seaward of the adjacent continental shelf sections from that outer limit up to a point situated on 54 degrees latitude north[301].

According to the joint minutes of the German and Dutch delegations which elaborated this treaty[302], it was to constitute an agreement in accordance with the first sentence of paragraph 2 of Article 6 of the Geneva Convention on the Continental Shelf. The two delegations started from the assumption that it was urgently necessary to draw a dividing line near the coast and that the partial boundary in extension of the line determined in the Supplementary Agreement to the Ems-Dollard Treaty should be defined with due regard to the special circumstances prevailing in the mouth of the Ems. Accordingly, the partial boundary was defined, practically speaking, by application of the equidistance method[303].

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[297] *Ibid.*, p. 214.

[298] Arcs of great circles are to connect four points expressed in geometrical terms therein. *Loc. cit.*

[299] *U.N.T.S.*, vol. 509 (1964), p. 140.

[300] *Ibid.*, (No. 7404), p. 2.

[301] *U.N.T.S.* (No. 8011), vol. 550 (1965), p. 128.

[302] See. *I.C.J. Pleadings,* North Sea Continental Shelf Cases, 1968, vol. I, p. 104.

[303] *U.N.T.S., loc. cit.,* article I.

The German delegation, however, expressed the view that the determination of the partial boundary does not affect the German claim with respect to the boundary line beyond the degree of 54 latitude, and that, in particular, it must not be concluded from the direction of the partially agreed alignment that it would have to be continued in the same direction[303].

Denmark and West Germany followed the above example by the treaty of June 9, 1965[305] in which they extended their shelf delimitation to a distance of only 25 miles seaward, describing an equidistance alignment starting from the northern extremity of Sylt Island and running to the point of 55°10'34" North and 7°33'9.6" East[306].

In a note from the President of the Belgian delegation for the delimitation of the continental shelf between Belgium and the Netherlands to the President of the Netherlands delegation, dated December 8, 1967[307], it is revealed that an imminent agreement, concerning delimitation of respective continental shelf areas between these limitrophe countries, "confirms the principle of the median line, every point of which is equidistant from the baselines from which the breadth of the territorial sea is measured".

Likewise, the equidistance method was applied in the delimitation agreement between Norway and Sweden of July 24, 1968[308].

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As is abundantly clear from the above perusal of state practice, it shows a great reliance on the "equidistance" method of delimitation of adjacent continental shelves. As this method is equally prescribed in Article 6 of the 1958 Geneva Convention on the Continental Shelf and, in fact, most agreements refer to the system as therein defined, the question of the normative content of the method in general international law[309] arises in the context of the interaction of customary and conventional law. This interesting and important question was extensively dealth with by the I.C.J. in the Continental Shelf Cases[310].

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[304] *Loc. cit.*

[305] *U.N.T.S.*, vol. 570, p. 91.

[306] Article I; and see Protocol to this treaty in *I.C.J. Pleadings, op. cit.*, p. 113 and joint Communiqué, *ibid.*, p. 115.

[307] *Ibid.*, p. 546.

[308] *Ibid.*, p. 551, at. p. 554.

[309] See PAWDA, David J. "Submarine Boundaries", *I.&C.L.Q.*, vol. 9 (1960), p. 628; ODA, Shigeru. "Boundary of the Continental Shelf". *Japanese Annual of International Law*, No. 12(1968), p. 264

[310] *Op. cit;* and see MAREK, Krystina. "Le probleme des sources du droit dans l'arrêt sur le plateau continental de la mer du nord". *Revue Belge de Droit International.* Vol. VI (1970-I), p. 44.

iii. *The Continental Shelf Cases.*

The cardinal issue in this case was whether the equidistance method, as prescribed in Article 6 of the 1958 Geneva Convention on the Continental Shelf represents, at the same time, a customary rule of law, imperative in the relations between conterminous states[311], whether formed before, after of during the conclusion of the said convention.

Whereas Denmark and the Netherlands contended that the equidistance principle sould be regarded as generally binding, the Federal German Republic contended that: (a) this method, as laid down in article 6 of the Continental Shelf Convention was not applicable against her, since she did not ratify the Convention, and that (b) in the absence of conventional regulation it would be inequitable to apply the equidistance method, since its effects would be to pull the line of the continental shelf boundary inward, in the direction of the strongly concave coastline of the Federal Republic while, at the same time, producing a widening tendency on the area of continental shelf off the coasts of its litigate neighbours, due to their outwardly curving coasts. The Federal Republic pleaded, therefore, that the parties be accorded each a "just and equitable share" of the continental shelf. This, in its view, implied the allotment of whlves in proportion to the lenght of the respective coastlines. As a means of giving effect to these ideas the Federal Republic proposed the method of the "coastal front" of façade, contituted by a recessed coast, upon which the necessary geometrical constructions would be erected.

The Court – after admitting the Federal Repuglic's first contention as to the inapplicability of Article 6 upon her – dismissed, as was mentioned above[312], the conception of apportionment of the continental shelf among littoral states according to distributive justice, giving each state "a fair and equitable" share of the shelf. It drew a neat distinction, for this purpose, between apportionment and delimitation, stating that its task in the present proceedings related to the second and not the first of these operations[313], and that the doctrine advanced by Germany appears to be wholly at variance with the fundamental concept of continental shelf entitlement as enshrined in article 2 of the 1958 Geneva convention. That is,

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[311] The Court, in fact, affirmed the extension of the mandatory force of customary rules *erga omnes;* "General or customary rules and obligations" stated the Court, "by their very nature, must have equal force for all members of the international community, and cannot therefore be the subject of any right of unilateral exclusion exercisable at will by any one of them in its own favour". Judgment, *op. cit.*, pp. 38/9.

[312] *Supra,* Chapter Three, Section 2, A.

[313] *Op. cit.*, p. 22.

> "the rights of the coastal state in respect of the area of continental shelf that constitutes a natural prolongation of its land territory into and under the sea *ipso facto* and *ab initio*, by virtue of its sovereignty over the land, and as an extension of it an exercise of sovereign rights for the purpose of exploring the seabed and exploiting its natural resources. In short, there is an inherent right"[314]

The Court's fundamentally geological conception of the continental shelf was shared by all parties to the litigation. Indeed, as Johnson remarks "In so far as a rule of law may be said to have emerged from the North Sea Continental Shelf Cases. . . it is the rule which may be called "the natural prolongation rule"[315]. Whereas, however, the Federal Republic contended that this implies consideration of the "geographical relation to the coast of a state as a whole, and not to one single point"[316] ; concretely:

> "that it is the connection with the coast at large measured by the breadth of the 'coastal frontage' of the state, that would be an appropriate criterion for determining what parts of the continental shelf before the coast must be regarded as the continuation of the state's territory into the sea"[317]

Denmark and the Netherlands, on their part, sought to rely on the same geological conception in pleading that the equidistance method was inherent to the fundamental conception on the *régime* of the continental shelf and that it thus entered the *corpus* of general international law, entirely irrespective of the Geneva Convention.

Conceretely, this contention, presenting equidistance as a "necessary, logical principle of law"[318], relied on the doctrine, elaborated as early as 1960 by Pawda[319], claiming that all those parts of the continental shelf must be considered as being appurtenant to a particular coastal state which are closer to it than they are to any point on the coast of another state, and that only a line drawn according to the equidistance method will obtain this result. "Closer proximity" is thus proclaimed as the logical correlative of "natural appurtenance". This was "the fundamentalist" aspect of the argumentation advanced by Denmark and the Netherlands, according to which the equidistance method had "an *a priori* character of so to speak juristic inevitability"[320]. The Court examined this aspect first because:

[314] *Loc. cit.*
[315] JOHNSON, D.H.N. "The North Sea Continental Shelf Cases". *International Relations*, the Journal of the David Davies Memorial Institute of International Studies, vol. III (1969), p. 522, at p. 530.
[316] *Pleadings, op. cit.*, p. 64.
[317] *Ibid.*, p. 426.
[318] See *I.C.J. Reports*, 1969. Dissenting opinion of Judge Koretsky, p. 158.
[319] *Op. cit.*
[320] Judgment, *op. cit.*, p. 29.

"if it is correct that the equidistance principle is. . . to be regarded as inherent to the basic concept of continental shelf rights, then equidistance should constitute the rule according to positive law tests also. On the other hand, if equidistance should not possess such *a priori* character of necessity or inherency, this would not be any bar to its having become a rule of positive law through influences such as those of the Geneva Convention and State practice"[321]

The Court admitted that the foregoing contention had much force. Indeed, this cunning argumentation, establishing a direct link between the title to sovereignty on an area and its delimitation, and thus making equidistance a rule inherent to the continental shelf doctrine, is admittedly appealing[322].

The Court, however, like the Federal Republic[323], criticised the absolute proximity notion. Referring to the various terms used in continental shelf proclamations issued by states, as well as to conventional and other instruments, it stated that:

"To take what is perhaps the most frequently employed of these terms, namely 'adjacent to', it is evident that by no stretch of imagination can a point on the continental shelf situated say a hundred miles, or even much less, from a given coast be regarded as 'adjacent' to it, or to any coast at all, in the normal sense of adjacency even if the point concerned is nearer to some one coast than to any other"[324].

Accordingly, the Court pointed out that there is no necessary, and certainly no complete, identity between the notions of adjacency and proximity and that even if proximity may afford one of the tests to be applied, an important one in the right conditions, it may not neccessarily be the only, nor in all circumstances, the most appropriate one. "Hence it would seem that the notion of adjacency, so constantly employed in continental shelf doctrine from the start, only implies proximity in a general sense, and does not imply any fundamental or inherent rule the ultimate effect of which would be to prohibit any state (otherwise than by agreement) from exercising Continental Shelf rights in respect of areas closer to the Coast of another State"[325].

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[321] *Loc. cit.*

[322] See dissenting opinions of Judges Tanaka, *ibid.*, p. 180 and Morelli, *ibid.*, p. 202.

[323] *Pleadings*, vol. I, pp. 62-64, 413-415.

[324] *Judgment*, p. 30.

[325] *Loc. cit.*

Moreover, the Court, developping its conception of the "natural prolongation" principle regarded as being "more fundamental than the notion of proximity"[326] demonstrated that the equidistance method is not its logical correlative and that the use of this method may even result in the negation of the principle. In a "curious blend of methaphysics and geology"[327] the Court stated that:

> "what confers the *ipso jure* title which international law attributes to the coastal state in respect of the continental shelf, is the fact that the submarine areas concerned may be deemed to be actually part of the territory over which the coastal state already has dominion, – in the sense that, although covered with water, they are a prolongation or continuation of that land territory, an extension of it under the sea. From this it would follow that wherever a given submarine area does not constitute a natural, or most natural extension of the land territory of the coastal state, even though that area may be closer to it than to the territory of any other state, it cannot be regarded as appertaining to that state; – or at least it cannot be so regarded in the face of a competeing claim by a state of whose land territory the submarine area concerned is to be regarded as a antural extension, even if it is less close to it"[329].

Concretely, equidistance cannot be identified with the notion of natural prolongation or extension, since its use would frequently cause areas which are the natural prolongation or extension of the territory of one state to be attributed to another, notably "when the configuration of the latter's coast makes the equidistance line swing out laterally across the former's coastal front, cutting it off from areas situated directly before that front"[329].

The Court confirmed its foregoing conclusions by an analysis of the genesis and development of the equidistance method. It thus discarded the view, advanced by the Netherlands and Denmark, that the notion of equidistance was "logically necessary, in the sense of being an *a priori* accompaniement of basic continental shelf doctrine"[330].

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[326] *Ibid.*, p. 31.
[327] JOHNSON, *op. cit.*, p. 535.
[328] *Op. cit.*, p. 32.
[329] *Loc. cit.*
[330] *Loc. cit.*

The Court found that it was in the I.L.C. that the question of delimitation of contiguous continental shelves was first taken up seriously as part of a general juridical project. In the Commission's records, found the Court, there is no indication that any of its members supposed that it was incumbent on the Commission to adopt a rule of equidistance because this gave expression to, and tranformed into linear terms, a principle of proximity inherent in the basic concept of the continental shelf, causing every part of the shelf to appertain to the nearest coastal state and no other, and because such a rule must therefore be mandatory as a matter of customary international law[331]. Indeed, the Court found that, as we saw above[332], the equidistance method only began to assume a certain prominence after the matter had been referred to the Committee of Experts and that so far from the I.L.C. considering it to have "*a priori* a character of inherent necessity" the Commission had contemplated various other methods of delimitation[333]. The Court concluded that it was in "an almost improptu, and certainly contingent manner" that the principle of equidistance was propounded[334].

In these circumstances the Court found that:

> "the inherency contention . . . inverts the true order of things in point of time"

and that:

> "so far from an equidistance rule having been generated by an antecedent principle of proximity inherent in the whole concept of Continental Shelf appurtenance, the later is rather a rationalization of the former – an *ex post facto* construct directed to providing a logical juristic basis for a method of delimitation propounded largely for other reasons"[335]

*

The Court proceeded to examine the question whether the equidistance "principle" has come to be regarded as a rule of customary international law through a positive law process, as was the second aspect of the Dutch-Danish contention on the subject of the mandatory content of this "principle"; the claim being that the work done in this respect by international legal bodies, state practice and the influence attributed to the

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[331] *Ibid.*, p. 34.
[332] *Supra*, this section, B (i)
[333] *Op. cit.*; paragraph 50.
[334] *Ibid.*, p. 35.
[335] *Ibid.*, p. 36, paragraph 56.

Geneva Convention itself have cumulatively evidenced or were creative of the requisite *opinio juris sive necessitatis*. For this purpose the Court examined, successively, the status of the "principle" as it stood when the convention was drawn up, as it resulted from the convention's effect, and in light of subsequent state practice.

The first of these questions, noted the Court, could conveniently be considered in the form suggested on behalf of Denmark and the Netherlands themselves; i.e., that they had not in fact contended that article 6 of the Convention "embodied already received rules of customary law in the sense that the Convention was merely declaratory of existing rules"; but, rather, that although prior to the Conference continental shelf law was only in the formative stage, and state practice lacked uniformity, yet "the process of the definition and consolidation of the emerging customary law took place through the work of the International Law Commission, in reaction of governments to that work and the proceedings of the Geneva Conference"; and this emerging customary law became "crystalized in the adoption of the Continental Shelf Convention by the Conference"[336]. Article 6 of the Convention, according to this contention, is the expression of that rule *in fieri et in status nascendi*.

The Court rejected this contention, stating that the Geneva Convention did not embody or crystalize any pre-existing rule of customary law, according to which the delimitation of continental shelf areas must, unless the parties otherwise agree, be carried out on an equidistance-special circumstances basis[337]. For this purpose it considered two factors: (a) the conditions of the introduction of the equidistance method by the I.L.C. as a basis for discussion at the Conference, and (b) the right to formulate reserves to article 6 of the Convention.

Upon examination of the first factor – by reference to its review in connection with the Dutch-Danish contention of an *a priori* necessity for equidistance – the Court found that:

[336] *Judgment*, p. 38.

[337] *Ibid.*, p. 41.

"the principle of equidistance, as it now figures in Article 6 of the Convention, was proposed by the Commission with considerable hesitation, somewhat on an experimental basis, at most *de lege ferenda,* and not at all *de lege lata* or as an emerging rule of customary international law. This is clearly not the sort of foundation on which Article 6 of the Convention could be said to have reflected or crystalized such a rule"[338].

The Court paid particular attention to the fact that article 6 of Geneva Convention is one of these in respect of which, under the reservation article of the Convention (article 12), reservations may be made by any state on signing, ratifying or acceding for, according to its view, this is a confirmation of the character *de lege ferenda* of the equidistance principle as therein formulated. Indeed, the Court – expressing a debatable conception of the nature and implication of reservations[339] – estimated that when, for whatever reason, rules and obligations of general or customary law are embodied, or are intended to be reflected in certain provisions of a convention, such provisions will figure amongst those in respect of which a right of unilateral reservation is not conferred, or is excluded. It inferred that any articles which do not figure amongst those excluded from the faculty of reservation under article 12, were not regarded as declarative of previously existing or emergent rules of law[340].

The Court proceeded by a perusal of the last stage in the Dutch-Danish contention, to the effect that a rule of customary international law consecrating the equidistance method came into being since the conclusion of the Convention, partly because of its own impact and partly on the basis of subsequent state practice. This contention involved treating article 6 as a norm-creating provision which has constituted the foundation of, or has generated a rule which, while only conventional or contractual in its origin, has since passed into the general *corpus* of international law, accepted as such by the *opinio juris* so as to have become generally binding. The Court examined successively the following factors of transformation of a conventional provision into a customary rule of law.

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[338] *Ibid.*, p. 39.
[339] See MAREK, *op. cit.*, pp. 62/3; LANG, *op. cit.*, pp. 97-99.
[340] *Op. cit.*, p. 39.

According to the Court only a provision of a "fundamentaly norm-creating" character can be regarded as forming the basis of a general rule of law. Secondly, such a conventional provision can become such a rule only if a very widespread and representative participation in the Convention is registered[341].

The Court found, as to the first of these elements, that the equidistance principle – in the particular form in which it is embodied in article 6 of the Geneva Convention, and having regard to the relationship of the article to other provisions of the Convention – does not fulfil the requirement of being of a "fundamentally norm-creating character"[342]. First, because article 6 causes the equidistance method to come only after a primary obligation to effect delimitation by agreement and this is "an unusual preface to what is claimed to be a potential general rule of law". Secondly, the part played by the notion of special circumstances in relation to the principle of equidistance as prescribed in article 6 and the ambiguity of this notion "must raise doubts as to the potentially norm-creating character of this rule". Finally, the faculty of making reservations to article 6 adds considerably, in the Court's view, to the difficulty of regarding this result as having been brought about (or being potentially possible) on the basis of the contention:

> "for so long as this faculty exists. . . it is the convention itself which would . . . seem to deny the provision of article 6 the same norm-creating character as for instance, articles I and 2 possess"[343].

With respect to the second element regarded by it as necessary before a conventional rule can be considered to have become a general rule of international law, the Court found that the number of ratifications and accessions so far secured to the convention was, though respectable, hardly sufficient "That non-ratification" stated the Court "may sometimes be due to factors other than active disapproval of the convention concerned can hardly constitute a basis on which positive acceptance of its principles can be implied; the reasons are speculative, but the facts remain"[344].

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[341] *Ibid.*, p. 42.

[342] The term "fundamentaly norm-creating" used by the Court is evidently ambiguous. In view of the difference between this and the French, somewhat misleading, translation ("fondamentalement normatif") the interpretation offered by Lang (*op. cit.*, p. 103) seems to be correct.

[343] *Op. cit.*, p. 42.

[344] *Ibid.*, p. 43.

In its ensuing examination of state practice subsequent to the Geneva Convention the Court adopted a markedly consensualist attitude, stating that:

> "Although the passage of only a short period of time is not necessarily, or of itself, a bar to the formation of a new rule of customary international law on the basis on what was originally a purely conventional rule, an indispensable requirement would be that in the period in question, short though it might be, state practice, including that of states whose interests are specifically affected, should have been both extensive and virtually uniform in the sense of the provision invoked; and should moreover have occured in such a way as to show a general recognition that a rule of law or legal obligation is involved"[345]

Indeed, the Court, while retaining in its perusal the two traditional elements of customary law, placed the greater emphasis on the decisive importance of the psychological element – the *opinio juris sive necessitatis*[346].

Relating to some 15 cases of delimitation occuring since the signature of the Geneva Convention which had been cited before it, the Court pointed out that these constituted only "a very small proportion of those potentially calling for delimitation in the world"[347] and that even if those instances were much more numerous they would not, even in the aggregate, suffice in themselves to constitute the *opinio juris.* In this respect the Court applied by analogy, *mutatis mutandis,* the dictum of the Permanent Court of International Justice in the Lotus case[348] and stated that:

> "the position is simply that in certain cases – not a great number – the states concerned agreed to draw the boundaries concerned according to the principle of equidistance. There is no evidence that they so acted because they felt legally compelled to draw them in this way by reason of a rule of customary law obliging them to do so – especially that they might have been motivated by other factors"[349]

The Court therefore considered that the precedents invoked were inconclusive and insufficient to bear the weight sought to be put upon them as evidence of such settled practice, manifested in such circumstances, as would justify the inference that delimitation according to the principle of equidistance amounts to a mandatory rule of customary international law.

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[345] *Loc. cit.*

[346] *Ibid.*, p. 44.

[347] *Loc. cit.*

[348] *P.C.I.J., Series A*, No. 10, 1927, at p. 28.

[349] *Op. cit.*, p.45.

Accordingly, the Court concluded that if the Geneva Convention was not in its origin or inception declaratory of a mandatory rule of customary international law enjoining the use of the equidistance method for delimitation of continental shelf areas between adjacent states, neither has its subsequent effect been constitutive of such a rule, and that relevant state practice has equally been insufficient for this purpose[350].

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As the Court found that the equidistance method is the most suitable of general application[351], clearly its dismissal of it as a generally applicable rule of law implied that no other mandatory method applies when all states involved are not bound by article 6, paragraph 2 of the Geneva Convention. This means in effect, as we saw above[352], that such cases are hardly justiciable.

However, the Court did not issue a *non liquet* but fulfiled its task in the operative part of its judgment[353] by providing the parties with the requisite directions, "without substituting itself for them by means of a detailed indication of the methods to be followed"[354]. The Court thereafter proceeds to investigate the principles by virtue of which the parties themselves will choose the method for eventual delimitation.

These principles are, according to the Court "that delimitation must be the object of agreement between the states concerned, and that such agreement must be arrived at in accordance with equitable principles"[355]. These, emphasized the Court, are "actual rules of law... which govern the delimitation of adjacent continental shelves – that is to say, rules binding upon states for all delimitations".[356]

The Court deducted the aforesaid principles from the *opinio juris* in the matter of delimitation[357] and "on a foundation of very general precepts

[350] *Loc. cit.*

[351] *Ibid.*, p. 24: "it would probably be true to say that no other method of delimitation has the same combination of practical convenience and certainty of application".

[352] *Supra*, chapter Three. Section 2, A (i).

[353] *Op. cit.*, pp. 47-54.

[354] *Ibid.*, p. 47.

[355] *Loc. cit.*

[356] *Loc. cit.*

[357] *Ibid.*, p. 37, paragraph 47: "The 'Truman proclamation' issued by the Government of the United States on September 28, 1945 . . . has in the opinion of the Court a special status. . . with regard to the delimitation of lateral boundaries between the continental shelves of adjacent states. . . the Truman Proclamation stated that such boundaries 'shall be determined by the United States and the State concerned in accordance with equitable principles'. These two concepts, of delimitation by mutual agreement and delimitation in accordance with equitable principles, have underlain all the subsequent history of the subject. They were reflected in various other State proclamations of the period, and after, and in the later work on the subject"; *ibid.*, paragraph 55: "Current legal thinking. . . was, and it realy remained to the end, governed by two beliefs; namely, first, that no one single method of delimitation was likely to prove satisfactory in all circumstances, and that delimitation

The goal to be achieved thus defined, the Court proceeded to enumerate a number of factors which should be taken into account in order to reach equitable results. The criteria include geographical aspects (the configuration of the respective coasts), geological elements (the natural features of the shelf), the idea that certain exploitable resources in the continental shelf constitute a unity which would be exploited most efficiently as a whole[367], and the notion that a certain degree of proportionality should be respected in the delimitation of lateral boundaries, according particularly to the lengths of the respective coastlines of all states concerned. Concretely, the Court ruled that:

> "(C) the principles and rules of international law applicable to the delimitation as between the Parties of the areas of the continental shelf in the North Sea which appertain to each of them beyond the partial boundary determined by the agreements of I December 1964 and 9 June 1965, respectively, are as follows:
>
> (I) Delimitation is to be effected by agreement in accordance with equitable principles, and taking a way as to leave as much as possible to each Party all those parts of the continental shelf that constitute a natural prolongation of its land territory into and under the sea, without encroachment on the natural prolongation of the land territory of the other;
>
> (2) If, in the application of the preceding subparagraph, the delimitation leaves to the parties areas that overlap, these are to be divided between them in agreed proportions or, failing agreement, equally, unless they decide on a régime of joint jurisdiction, user, or exploitation for zones of overlap on any part of them;
>
> (3) In the course of the negotiations, the factors to be taken into account are to include:
>
> (I) the general configuration of the coasts of the Parties, as well as the presence of any special unusual features;
>
> (2) so far as known or readily ascertainable, the physical and geological structure, and natural resources, of the continental shelf areas involved;
>
> (3) the element of a reasonable degree of proportionality, that a delimitation carried out in accordance with equitable principles ought to bring about between the extent of the continental shelf areas appertaining to the coastal state and the length of its coast measured in the general direction of the castline, account being taken for this purpose of the effects, actual or prespective, of any other continental shelf delimitations between adjacent states in the same region"[368].

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[367] See especially Separate Opinion of Judge Jessup, *ibid.*, pp. 67-84.

[368] *Ibid.*, p. 54.

Summing up, the Court's judgment, in its operative part, tends to confirm and confine the above observation on the nature of the first sentence of both the substantive paragraphs of article 6 of the Geneva Convention. It seems that the obligation to negotiate, in the terms announced by the Court, and the definition of the notion "negotiations in good-faith", is the cardinal innovation of this judgment in the context of the law of international boundaries.

Indeed, announcing this obligation the Court referred to the pronouncement of the P.C.I.J. in the Free Zones Case[369] to the effect that the judicial settlement of international disputes "is simply an alternative to the direct and friendly settlement of such disputes between the parties"[370], legally concertizing this *voeu*. The doctrine of the primordial importance of negotiations as a means to operate delimitation is thus elevated, in the case of adjacent continental shelves, to the rank of a concretely applicable legal principle.

The foregoing conclusion receives additional confirmation by the Court's actual amputation of the "equidistance principle". In fact, the Court was considerably impressed by the Federal Republic's concrete demonstrations that the automatic application of this method may lead to inequitable results[371], as the Court explained in its judgment[372]. This pragmatic consideration underlay its dismissal of any single imperative rule of delimitation and its strong emphasis, instead, of the conventional nature of the delimitation operation.

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[369] *P.C.I.J., Series A*, No. 22.

[370] *Ibid.*, at p. 13.

[371] See *Pleadings, op. cit.*, pp. 37-50, 62-74; *ibid.*, vol. II, pp. 27-37; 178-192.

[372] *Op. cit.*, p. 49.

## 4. *SYNOPSIS*

Throughout this chapter it was demonstrated that normative regulation, in the context of delimitation, tends to confine itself to considerations of stability. *Ratio legis est anima legis.*

Whereas the only clearly substantial, imperative rule of general applicability relates to state succession no such rules exist to regulate original delimitation.

In a limited scope the notion of *uti possidetis,* which is based upon the same considerations of stability, fulfils the latter function; for this concept, altogether dispensing with the need of previous delimitation, obviously regards quantity rather than identity and makes delimitation a function of territorial disposition.

Delimitation of maritime expanses does not involve the same considerations. As the foregoing examination of the legislative history of the relevant articles in the 1958 Geneva Conventions demonstrates, however, the tendency to provide for rules of delimitation which regarded it as a function of distribution manifested itself in this case, too. The underlying considerations of *status quo* consecration lacking, however, stress was finally put on conventional delimitation.

## CONCLUSION

The recent trend in delimitation practice shows great reliance on policy considerations expressing refusal to change an existing *status quo*. Indeed, the Charter of the United Nations consecrates this as a legal principle (Article 2(4)). No wonder, therefore, that most contemporary delimitations have as their basis the previous boundary lines. Such considerations also dominate judicial practice, as is made evident throughout the present dissertation.

Considerations of stability might, therefore, in future evolve to become concretized in some imperative legal rule governing the question of delimitation beyond the scope of the rule of state succession, and probably through the concept of *uti possidetis*. This tendency, which conceives of boundary problems as an inseparable aspect of territorial problems, is today especially manifest in Africa. It has not, however, matured yet; principally because it does not easily conjoin with the tendency remarked throughout this study to strengthen the principle of state sovereignty in the context of delimitation.

*

As Verzijl[1] rightly remarks "political reality shows *ad nauseum* how much weight is still up to the present time attached to the frontier as a strict line of separation between territorial sovereignties and how necessary it remains to keep arms at the ready with the object of defending the national territory against treacherous foreign invasions, intrusion of spies, infiltration of subversive propaganda, etc. Frontiers as defensive partitions remain indispensable so long as the cry for 'peaceful co-existence' is not much more than a deceitful catchword designed to induce others into a trap."

Contemporary practice shows no slackening in the importance which states attach to the problem of delimitation. Indeed, as was noted in chapters Two and Three herein the evolution, since 1945, is clearly towards affirmation of the principle of "equal sovereignty" in this respect, to the extent that states are averse, today more than ever, to entrust the matter

[1] VERZIJL, J. H. W. *International Law in Historial Perspective*. Leyden, A. W. Sijthoff, 1970; Part III, p. 516.

with third parties, be these Mediators, Courts, Tribunals, Big Powers, International Institutions or other organs. World War II is really the turning point in this respect, for whereas before it delimitations were operated through various procedures, the practice after the war is almost homogeneous –international boundaries are established by the limitrophe states through direct negotiations. In fact, the recent trend, as expressed in multilateral conventions and by the I.C.J. in relation to maritime international boundaries, is, as is shown in chapter Four herein, towards affirmation of this practice as a legal principle through the concept of *pactum de contrahendo*. Moreover, it seems that United Nations practice implicitly confirms the same tendency[2].

The principle that the international boundary is exclusively a product of limitrophe states, as elaborated in chapter One herein, thus governs the whole subject from the viewpoint of contemporary international law. Affirmed by doctrine and judicial practice, it conditions the behaviour of states in their mutual relations. Rooted in the legal nature of the boundary, it explains the primordially conventional character of the delimitation operation. The elucidation of this phenomenon is, it is hoped, the modest contribution of this work to the study of boundaries in international law.

Although the work is thus mostly devoted to establish the opposability theory, the reader might find useful the reference which was abundantly made in it to the vast, decomplex case material. Various acute boundary problems were investigated, classified, clarified and precised in their bearing on the general context of this study.

The foregoing examination of material relating to delimitation is, however, far from being a consummation of the subject. A compendious compilation of relevant data is disturbingly wanting. The tables of Treaties and Cases herein included[3] are not exhaustive in this repsect, being selectively established and didactically oriented. A comprehensive, conclusive work in this context will, undoubtedly, greatly facilitate future study on the present hardly explored subject. But this is a work beyond the scope of the present study to perform.

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[2] *Infra*, Chapter Two, Section 3, B.

[3] And see CUKWURAH, pp. XVI-L

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